peculiar circumstances which gave an opportunity for Jurgens' crime, was, as to the plaintiff, actionable negligence? We think it was not. To constitute actionable negligence there must not only be a violation of duty owing by one to another or to the public, but the injury must be the natural consequence of the alleged negligent act or one which might reasonably have been anticipated. Parke, B., in *Bank of Ireland* v. *Evans's Charities*, 5 H. L. Cas. 389, where it was claimed a corporation was bound by the fraudulent affixing by its secretary of the seal of the corporation in his custody, to a power of attorney to transfer its funds in the Bank of Ireland, states the true ground of actionable negligence in such a case. Speaking for the judges, he says: They are all of opinion "that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself." Blackburn, J., in *Swan* v. *North British Australasian Co.* 2 Hurlst. & C. 181, states the principle with even greater perspicuity. He says: "The neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what amounts to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

The claim that the injury to the plaintiff was occasioned by the omission of the defendant to exercise proper supervision over the conduct of Jurgens has, we think, no force. There was an interval of about three weeks between the time when the certificates were surrendered to the company and their abstraction and transfer by Jurgens. If during this period the officers of the defendant had examined the contents of the safe, it might have been ascertained that the certificates were uncanceled. An examination after that time would not have benefited the plaintiff, at least there is no evidence that a discovery of the fraud after it had been accomplished would have changed his position. The transfers of stock on the books of the company were comparatively infrequent. The president had reason to suppose that Jurgens would obey his directions and cancel the certificates, and the omission to inquire whether he had done so, during the period mentioned, is, as we think, quite insufficient to support the charge of negligence.

Finally, if the company had been the owner of some of its own shares, or if it had owned shares in other corporations which had been deposited in its safe for safe keeping, and they had been stolen and sold by Jurgens to the plaintiff, there can be no doubt that the company could reclaim them, and the loss would fall upon him. It is difficult to see how he could acquire a better right to the surrendered certificates or charge the company with damages resulting from Jurgens' crime.

Having reached the conclusion that there was no actionable negligence on the part of the defendant, it is unnecessary to consider the other questions argued at the bar.

The judgment below should be reversed and a new trial ordered, with costs in all the courts to abide the event.

All concur.

MARYLAND COURT OF APPEALS.

CONSOLIDATED GAS COMPANY OF BALTIMORE CITY, *Appt.*,
v.
John J. CROCKER.

(82 Md. 113.)

1. Carrying a lighted lamp into or igniting matches in a cellar filled with gas which afterwards explodes cannot be pronounced contributory negligence as matter of law so as to defeat a recovery for the injury resulting from the explosion, unless it appears affirmatively and without dispute that such acts caused the explosion.

2. Failure of a gas company to exercise any care to discover and remedy a leak which proves to be in its street mains, when notified that gas is escaping into the cellar of a building abutting on the street, may render the escape of the gas evidence of negligence which will make it liable for injuries caused thereby.

(December 6, 1895.)

NOTE.—A very extensive *note* on liability for negligence in the escape and explosion of gas is found with the case of Ohio Gas Fuel Co. v. Andrews (Ohio) 29 L. R. A. 337. See also Evans v. Keystone Gas Co. (N. Y.) 30 L. R. A. 651.

APPEAL by defendant from a judgment of the Superior Court of Baltimore City in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by an explosion of gas for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. Alexander Preston, Alexander Preston,** and **William A. Fisher,** for appellant:

The evidence presents a clear case of contributory negligence.

Lanigan v. *New York Gaslight Co.* 71 N. Y. 29; *Bartlett* v. *Boston Gaslight Co.* 117 Mass. 533, 19 Am. Rep. 421; *Oil City Gas Co.* v. *Robinson*, 99 Pa. 1; *Hampton* v. *Cradley Heath Gas Co.* 8 Am. & Eng. Enc. Law, p. 1274, note; *Vallée ès Qualité* v. *New City Gas Co.* (Montreal Super. Ct.) 7 Am. L. Rev. 767; *Holden* v. *Liverpool New Gaslight & C. Co.* 3 C. B. 14; *Brown* v. *New York Gaslight Co.* Anth. N. P. 351; *Dietrich* v. *Baltimore & H. S. R. Co.* 58 Md. 358; *Baltimore & P. R. Co.* v. *State*, 54 Md. 655.

There is no evidence of negligence.

According to the evidence produced by the appellee, gas continued to escape into the cellar until the time of the explosion in consider-

See also 33 L. R. A. 366; 36 L. R. A. 683; 44 L. R. A. 92; 47 L. R. A. 790.

able volume, but no notice was given to the defendant until after the explosion.

Holly v. *Boston Gaslight Co.* 8 Gray, 121, 69 Am. Dec. 233; *Bartlett* v. *Boston Gaslight Co.* 122 Mass. 213.

Messrs. **John F. Preston** and **E. Beverly Slater,** for appellee:

To justify a court in taking a case from the jury on the ground of contributory negligence of the plaintiff, there must be no room for ordinary minds to differ as to such contributory negligence.

People's Bank v. *Morgolofski*, 75 Md. 442; *Cumberland Valley R. Co.* v. *Maugans*, 61 Md. 61, 48 Am. Rep. 88; *North Baltimore Pass. R. Co.* v. *Arnreich*, 78 Md. 593; *Baltimore Traction Co.* v. *State*, 78 Md. 422.

The question of contributory negligence was properly submitted to the jury, and it "was a question which the trial court could not properly decide for itself, but was bound to submit to the jury as one which they alone could answer."

Greany v. *Long Island R. Co.* 101 N. Y. 419.

As to the duties and responsibilities of gas companies generally and the degree of care required of them, see —

Butcher v. *Providence Gas Co.* 12 R. I. 149, 34 Am. Rep. 626; *Emerson* v. *Lowell Gaslight Co.* 3 Allen, 413; *Mose* v. *Hastings & St. L. Gas Co.* 4 Fost. & F. 324; *Schermerhorn* v. *Metropolitan Gaslight Co.* 5 Daly, 144; *Bartlett* v. *Boston Gaslight Co.* 122 Mass. 209.

Evidence of contributory negligence sufficient to raise a question of law to be decided by the court must establish without contradiction the direct fact in issue, and such fact must be decisive of the cause under trial.

McMahon v. *Northern C. R. Co.* 39 Md. 449; *Baltimore & O. R. Co.* v. *Fitzpatrick*, 35 Md. 44; *Baltimore Traction Co.* v. *State, supra; Grabrues* v. *Klein*, 81 Md. 83; *People's Bank* v. *Morgolofski*, and *Cumberland Valley R. Co.* v. *Maugans, supra; Cooke* v. *Baltimore Traction Co.* 80 Md. 551.

The weight of the testimony produced at the trial, the credibility of witnesses, etc., as to whether or not the accident was caused by an explosion of illuminating gas or gasoline, belong peculiarly to the jury, and will not be considered by this honorable court.

Grabrues v. *Klein, supra.*

McSherry, J., delivered the opinion of the court:

The only questions we have before us on this appeal are those which arise in consequence of the rejection by the trial court of the prayers presented by the defendant for instructions to the jury, and those which grow out of the granting by the court of three instructions of its own. The case is one founded in alleged negligence. The fundamental principles which must govern its decision are thoroughly settled and established. To apply those principles correctly is all that is required. The defendant below (the appellant here) is a gas company. It manufactures and supplies gas for illuminating purposes. The gas is transmitted through mains and pipes underneath the surface of streets into houses and elsewhere. The plaintiff below (the appellee here) leased and occupied certain premises in Baltimore city. In those premises he conducted a saloon. He moved into them on or about the 20th of November, 1891. At that time the odor of escaping gas was very perceptible in the cellar of the house. When an employee of the gas company was notified that the gas was escaping and accumulating in the cellar, he stated that another employee of the company would be sent to remove the old meter and to replace it with a new one, as was customary whenever there was a change in the occupants of premises; and, when the attention of the employee who did remove the old meter was called to this odor, he stated that he guessed the new meter would remedy the matter. In fact, however, this did not furnish a remedy, and gas continued to flow into the cellar to such an extent that it was necessary to keep the door closed at the head of the stairway leading from the cellar into the dining room. There was evidence tending to show that the gas escaped from a main which ran under and parallel to the sidewalk, and that, thus escaping, it penetrated the front wall of the premises occupied by the plaintiff. In the cellar there was a gasoline stove, used for cooking oysters. On the evening of December 3, 1891, Mrs. Staengler, an employee of the appellee, went into the cellar for the purpose of frying some oysters. She closed the door behind her at the head of the cellar stairway. She took with her a lighted coal-oil lamp, and placed it on a bracket near the top of the cellar, and then proceeded to ignite the gasoline in the stove. The cellar had been opened but once in the preceding twenty-four hours, and then only for a brief period. She struck several matches, but there being, apparently, some water in the cup of the stove, the gasoline did not vaporize and burn. Mrs. Bryant, an acquaintance of Mrs. Staengler, then entered the cellar, but left the door leading to the dining room open. In the dining room, and just opposite the door leading into the cellar, two gas jets were burning. According to the testimony of Mrs. Staengler, she threw a basin of water, containing a few spoonsful of gasoline, on the coal pile, and in about two minutes after again lighting the gasoline stove, which immediately went out, she happened to look in the direction of the steps leading up to the dining room, and there she saw a sheet of bluish flame, which was instantly followed by an explosion. This explosion occurred in about ten minutes after Mrs. Staengler had entered the cellar with the lighted coal-oil lamp. This lamp continued to burn during the whole time Mrs. Staengler was in the cellar. The force of the explosion was so great that it threw Mrs. Bryant out of the front cellar door, and did considerable damage to the building. The coal-oil lamp suspended in the cellar was uninjured, but the globes on the gas jets in the dining room were shattered. According to the testimony of Mrs. Bryant, who was called as a witness for the defendant, Mrs. Staengler emptied the gasoline out of the stove into a basin, and then replenished the stove, and threw the basinful of gasoline on the coal pile. She further stated that after this Mrs. Staengler lit several matches to start the fire in the stove, and that shortly after the explosion occurred. It was further shown that after the explosion had taken place sev-

eral persons entered the cellar, and found a blaze proceeding apparently from burning oil in the coal pile.

By rejecting the defendant's first prayer the court refused to rule that, in law, the act of entering the cellar with the lighted coal-oil lamp, under the circumstances stated, was such a glaring act of contributory negligence, contributing to the injury complained of, as to preclude a recovery by the plaintiff. Had it been a *concessum* in the case, or had it even been clear, from the evidence, that the lighted coal-oil lamp carried into the cellar caused the explosion, there would have been some foundation for imputing contributory negligence to the plaintiff's employee in carrying it there. Not only does it not appear that the carrying of the lamp into the cellar actually caused the explosion, but the defendant, on the contrary, strenuously insists that there was no explosion of gas at all, but that the explosion proceeded from gasoline. When large quantities of gas have escaped into a building, and have commingled with the air therein, and thus formed a highly explosive compound, and this condition is known to a person entering such building, it is obviously, in law, a grossly negligent act to enter with a lighted candle or lamp, or to strike a match after entering, because, according to known and unvarying laws, an explosion, or a suddenly liberated mechanical energy, resulting from the instantaneous combustion of the inflammable compound when brought in contact with a flame, will inevitably follow. And when, under these conditions, an explosion does instantly result the moment a flame is brought in contact with such a compound of gas and atmosphere, the fact that the flame caused the combustion and the consequent and simultaneous explosion is beyond reasonable dispute or question. The deliberate or the careless application of a flame to such an explosive compound is clearly an act of negligence so unequivocally contributing to the production of the injury that no recovery can be had by the person guilty of, or chargeable with, that act of concurrent negligence. And this is precisely what was decided in *Lanigan* v. *New York Gaslight Co.* 71 N. Y. 29; *Oil City Gas Co.* v. *Robinson*, 99 Pa. 1. In these cases the explosion instantly followed upon a light being brought in contact with the gas, and there could be no possible dispute that the bringing of the light in contact with the gas caused the explosion. But where there is not such a connection between the act of entering the house with a lighted lamp and the explosion of the gas as to establish with certainty, and to the exclusion of any other reasonable hypothesis, the relation of cause and effect, the question as to what did cause the explosion is for the jury to solve under proper instructions from the court. When, therefore, as here, more than ten minutes intervened between the time the lamp was taken into the cellar and the time that the subsequent explosion occurred, and when, as here, the lamp itself was uninjured, it would be impossible for the court to assume that the lighted lamp caused the explosion, and to rule, as a conclusion of law, that the plaintiff's employee was guilty of contributory negligence in taking the lamp into the cellar. And this is true, also, with respect to the lighting of the matches to ignite the gasoline in the stove. Assuming, as must be done in discussing this prayer, that all the evidenced adduced by the plaintiff was true, then at least two minutes intervened between the period of time when the last match was struck, and the stove was lighted and extinguished for the last time, and the period when the explosion took place; and there was obviously, therefore, no evidence to show that the explosion proceeded from these matches or from the stove. If, then, the evidence failed to show affirmatively, and without dispute, that the explosion resulted from the lighted lamp or from the burning matches being brought in contact with the gas, it would have been improper for the court to say, as a legal conclusion, that the taking of the lighted lamp into the cellar, or the striking of the matches there, was an act of contributory negligence, directly contributing to the production of the injury complained of, because, unless the explosion did result from the one or the other causing a conbustion, then neither the one nor the other contributed to the explosion. If there is no evidence to show that a particular act of imputed negligence did actually concur in producing an injury, then there is no evidence that the doing of that act was in itself contributory negligence, and it would be clearly erroneous to ascribe to it that character or quality. To justify a court in pronouncing a given act such an act of contributory negligence as to defeat a recovery, it must be a distinct, prominent, and decisive fact, about which ordinary minds would not differ, because, where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality, as matter of law. *Cooke* v. *Baltimore Traction Co.* 80 Md. 558. Under the conditions we have stated, and in view of the failure of the evidence to show that the lamp or the matches, to the exclusion of every other reasonable probable cause, occasioned the ignition or combustion that produced the explosion, the court was right in declining to rule, as requested in the defendant's first prayer, that the plaintiff had been guilty of such pronounced negligence, directly contributing to the injury, as to preclude a recovery.

The defendant's second prayer was also properly rejected. It asked the court to instruct the jury that the plaintiff had offered no legally sufficient evidence of negligence on the part of the defendant. Assuming the truth of the evidence adduced by the plaintiff, it was clearly negligence on the part of the defendant to allow gas to escape from its pipes after receiving notice that a leak existed. "While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require in the case of a gas company not only that its pipes and fittings should be of such materials and workmanship,

and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business." *Koelsch* v. *Philadelphia Co.* 152 Pa. 355, 18 L. R. A. 759. A neglect or a failure to use such precautions would be clearly negligent. It cannot be doubted, if the evidence adduced by the plaintiff be credited, that the least attention or diligence on the part of the company's employees would have apprised them of the escape of gas into the street and through the walls of the plaintiff's house. The defendant's employee had been notified of the escape of gas. He had promised to remedy it when the new meter should be placed in position, but he failed to search for or to discover whence the leaking gas proceeded. He seems to have assumed that the change in the meter would obviate the trouble, but he made no search, nor did the other employee who put the new meter in position endeavor to locate the leak. It was clearly negligence on the part of these employees not not to make some effort to discover the location of the defect which caused the leak. They were aware of the leak, and that was notice to the company. It then became obligatory on the company to use reasonable efforts, in a reasonable time, to ascertain where the leak was, and to stop it. *Mose* v. *Hastings & St. L. Gas Co.* 4 Fost. & F. 324. If, instead of doing this, the company's employees chose to assume that a change of the meter would remedy the complaint, though confessedly they did not know whether it would or not, they obviously did not discharge the duty incumbent upon them, and their negligence in this particular was the negligence of the company. When a gas company is made aware, as in this case, that large quantities of gas are escaping into a building, it becomes its plain duty to use reasonable diligence to discover and to stop the leak. It cannot discharge that duty by assuming, without knowing, that the leak proceeds from one source, when in fact it proceeds from a totally different source, which could have been discovered by proper inspection. This rule requires nothing unreasonable. It does not require that the company shall keep up a constant inspection all along its lines, without reference to the existence or nonexistence of a probable cause for the occurrence of leaks or escapes of gas; but it does require that, when notice of the existence of a leak has been given to a company, the company shall use reasonable care and appropriate means to discover the cause of the leak, and to remedy it. This doctrine is not in conflict with the principle laid down in *Hutchinson* v. *Boston Gaslight Co.* 122 Mass. 219, and other cases of a kindred character. "There the escape of gas complained of was the result of an overwhelming calamity that laid a great part of the city of Boston in ashes, and fractured and severed the company's pipes in so many places that all the force it could employ could not guard against all possible consequences of the escape of gas immediately, without shutting off the supply from the whole city, and this it was excused from doing on the ground that more mischief would result therefrom than was likely to result from the neglect so to do." *Koelsch* v. *Philadelphia Co. supra.* The escape of gas from the defendant's main was, under the circumstances stated, after it had received notice that gas was escaping into the plaintiff's house, and after it had failed or neglected to use reasonable care or proper inspection to discover the location of the leak and to stop it, some evidence of negligence; and the court would not have been justified in withdrawing the question of negligence from the consideration of the jury. We are not called on to go further, or to lay down a broader rule than this, in the pending case, and we are not to be understood as doing so, though it has been held by courts of high authority that the escape of gas from the mains underneath the surface of a public street, unless explained, is prima facie evidence of some neglect on the part of a gas company. The case of *Smith* v. *Boston Gas light Co.* 129 Mass. 318, is an illustration of this doctrine.

The defendant's third and fifth rejected prayers were fully covered by the court's instructions, and the appellant has therefore no reason to complain of the refusal of the court to grant them. We find no errors in the instructions given by the court. There were two opposite theories presented by the evidence. The plaintiff founded his case upon the theory that the gas which escaped into the cellar, and was confined there while the doors leading into the cellar were closed, rose when Mrs. Bryant entered the cellar and omitted to close the door behind her, and in a few moments came in contact with the lights at the head of the cellar steps, and then exploded. It was, according to the testimony of Mrs. Staengler, at the head or top of these steps that she saw the bluish flame spread out at the moment of the explosion. A slat partition across the cellar was partially blown down, towards the street and away from the steps, as though the force had been applied from the side next to the cellar steps—the side nearest the lighted gas jets at the head of the stairway. On the other hand, assuming, first, that the explosion was a gas explosion, it was insisted that the plaintiff was guilty of contributory negligence; and, seccondly, denying that it was a gas explosion, it was contended that the explosion was caused by gasoline. The first contention we have already considered. It is not necessary to state the evidence relied on by the appellant to support the second alternative. Suffice it to say that both theories were fairly submitted to the jury by the instructions given by the learned and accomplished trial judge, and that upon both theories the law was accurately and clearly announced. It became then solely the province of the jury to determine the facts, and if they found, as they were required to find before returning a verdict for the plaintiff, that the gas escaped by reason of the negligence of the defendant, that the explosion was a gas explosion, and that the act of Mrs. Staengler in going into the cellar with a lighted lamp and striking matches there was, under all the circumstances, such conduct as a person of ordinary prudence and care would

have pursued, they were warranted in finding a verdict for the plaintiff. If, on the contrary, they found that the explosion was a gasoline explosion, or that, being a gas explosion, Mrs. Staengler had been guilty of negligence in entering the cellar with a lighted lamp, or in striking matches there, and that either of these acts caused the explosion, the plaintiff was not entitled to recover. The second instruction correctly defined where the burden of proof rested. As we find no error in the rulings of the trial court, its judgment must be affirmed.

Judgment affirmed, with costs above and below.

BOLTON MINES COMPANY, *Appt.*,
v.
Francis STOKES *et al.*

(82 Md. 50.)

Bringing a suit in replevin for goods sold, and discontinuing it before judgment without obtaining benefit therefrom because the value of the goods was paid by the plaintiff to satisfy his replevin bond, do not estop him from claiming payment of the purchase price out of the assets of the estate of the purchaser.

(December 6, 1895.)

APPEAL from an order of the Circuit Court of Baltimore City denying the claim of appellant against the insolvent estate of the Waring Manufacturing Company. *Reversed.*

The facts are stated in the opinion.

Messrs. **Fielder C. Slingluff** and **William S. Bryan, Jr.**, for appellant:

It was error to hold that the appellant was estopped, by its attempt in the replevin case to rescind the contract of sale, from now claiming under that contract.

McQueen's Appeal, 104 Pa. 601, 49 Am. Rep. 592.

A party is not estopped from assuming a position forced upon him by the opposite party.

7 Am. & Eng. Enc. Law, p. 22, note; *Potter* v. *Brown*, 50 Mich. 436; Bigelow, Estoppel, p. 719; *Pendleton* v. *Dalton*, 92 N. C. 185.

It is familiar practice for attaching creditors who have unsuccessfully assailed a deed of trust for the benefit of creditors as fraudulent to afterwards come in and take their dividend under the deed.

Burrill, Assignm. p. 607; *Brashear* v. *West*, 32 U. S. 7 Pet. 615, 8 L. ed. 804; *Vernon* v. *Morton*, 8 Dana, 254; 2 Enc. of Pl. & Pr. p. 873, note; *Re Van Norman*, 41 Minn. 494.

Messrs. **Gans & Haman** and **Vernon Cook**, for appellees:

The Bolton Mines Company having declared its intention to rescind this contract, it is now bound by its election, and cannot be allowed to change front and assume the wholly inconsistent position that the contract is binding and the note still enforceable.

Edes v. *Garey*, 46 Md. 41; *Beall* v. *Pearre*, 12 Md. 566; *Walsh* v. *Chesapeake & O. Canal Co.* 59 Md. 427; *Kiddall* v. *Trimble*, 1 Md. Ch. 143; *Wile* v. *Brownstein*, 35 Hun, 68; *Farwell* v. *Myers*, 59 Mich. 180; *Goss* v. *Mather*, 2 Lans. 283; *Vorhees* v. *Earl*, 2 Hill, 288, 38 Am. Dec. 588; *Strong* v. *Strong*, 102 N. Y. 69.

A party cannot, either in the course of litigation or in dealings *in pais*, occupy inconsistent positions. And where a man has an election between inconsistent courses of action, he will be confined to that which he first adopts.

Bigelow, Estoppel, p. 673; *Thompson* v. *Howard*, 31 Mich. 309; *Steinbach* v. *Relief F. Ins. Co.* 77 N. Y. 498, 33 Am. Rep. 655; *Washburn* v. *Great Western Ins. Co.* 114 Mass. 175; *Fisher* v. *Boyce*, 81 Md. 46.

McSherry, J., delivered the opinion of the court:

In December, 1889, the Bolton Mines Company contracted to sell to the Waring Manufacturing Company a quantity of fertilizers. The sale was made, the goods were delivered, and the purchaser gave its promissory note to the vendor on March 15, 1890, for the price agreed on, payable in four months after its date. On the 23d day of May, 1890, before the maturity of this note, the Waring Manufacturing Company executed to Hanson H. Haines and Francis Stokes, trustees, a deed of trust for the benefit of its creditors, and the trustees filed their bond in Cecil county on May 31, and in Baltimore city on June 11, 1890. On June 9 of the same year the Bolton Mines Company sued out a writ of replevin, and under it the sheriff seized and took from the possession of the trustees, and turned over to the Bolton Company, the same fertilizers that had been sold by it to the Waring Company under the contract of December, 1889; and five days afterwards the Bolton Company tendered the trustees the promissory note given for the purchase price, but the trustees declined to receive it. After the Bolton Mines Company got possession of the fertilizers under the writ of replevin, it discontinued or dismissed the replevin suit without trial, and thereafter, on April 10, 1891, the trustees instituted suit in the superior court of Baltimore city against the surety of the Bolton Mines Company on the replevin bond which had been given by it, and that suit resulted in a judgment in favor of the trustees for the penalty of the replevin bond, to be released on the payment of the sum of $4,464.72, the value of the replevied fertilizers at the date of their seizure under the writ of replevin, together with interest to the date of the verdict. Part of this judgment has been paid, and the residue is to await the result of this proceeding, but may be treated as actually paid. The Bolton Mines Company then filed in the Waring Company's trust estate proceeding the note of the Waring Company held by the Bolton Company; and when the auditor made his report, distributing the cash assets in the hands of the trustees among the creditors of the Waring Company, he allowed to the Bolton Mines Company its ratable share or percentage upon the note of March 15. To this allowance Haines and Stokes, who are creditors, as well as trustees, filed objections. The ground upon which the trustees, in their character as creditors, object to this allowance is that the Bolton Mines Com-

NOTE.—As to election of remedies, see also Miller v. Hyde (Mass.) 25 L. R. A. 42, and cases cited in *footnote* thereto.

pany, having by replevying the fertilizers for the payment of which the note was given, disaffirmed the sale, and having treated the contract of purchase as rescinded, cannot after a judgment has been obtained against it on the replevin bond for the value of the identical articles replevied, reaffirm the sale, and claim to participate in a distribution of the proceeds of the debtor's assets. The court below so decided and hence this appeal.

Does the fact, then, that the Bolton Mines Company sued out a writ of replevin, and seized thereunder the same fertilizers which it had previously sold to the Waring Company, preclude the vendor, the Bolton Company, from asserting a claim to a proportion of the creditor's assets, if the vendor abandoned the replevin suit without a trial, and then paid to the vendee's trustees the full value of the replevied articles? This is the single question which the pending appeal presents.

The situation is a peculiar one. The Bolton Mines Company and the trustees are precisely in the position both would have occupied had not the replevin been sued out; for the Bolton Mines Company still has the note of the vendee, the trustees have in money the value of the fertilizers, and the note is unpaid. This being so, the Bolton Company asks a court of equity to allow to it from the assets of the debtor—in which assets are included the values of the creditor's fertilizers—a percentage equal to that distributed to the debtor's other general creditors; but the court, by its order, refuses this request, and excludes the Bolton Company from participating in the distribution of even the very funds which have been realized from the identical property that the Bolton Company sold and delivered to its insolvent debtor, and for which the vendor has received no payment whatever. Can that order be maintained? It is not pretended that it can be supported upon any other theory or ground than this: that the creditor, having, by the replevin of his suit, elected to treat the original contract of sale as rescinded, cannot afterwards assert the validity of that same contract, and claim to be paid for the goods furnished under it; that, having two alternative remedies, and having selected one of them, and having failed to prosecute it to a final judgment, it cannot resort to the other. Thus abstractly put, the proposition appears far more reasonable and just than when it is practically applied. The actual result of its application to the facts of this case is that the Bolton Company loses the full value of the fertilizers which it sold to the insolvent vendee, and is besides entirely cut out from sharing in the vendee's assets. The vendor, the Bolton Company, therefore gets nothing, and the other creditors get the value of the Bolton Company's fertilizers. It must be an exceedingly rigid and stringent rule of law that will constrain a court of equity to work out such a singular and inequitable result. Is there such a rule as that? It cannot be denied that "the law is adverse to multiplying suits; and, if a party has a choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal either for or against him, as a general rule he will not be permitted to resort to the other." *Beall* v. *Pearre*, 12 Md. 566; *Walsh* v. *Chesapeake & O. Canal Co.* 59 Md. 427. And so in *Edes* v. *Garey*, 46 Md. 24, where Carson was both executor and trustee under a will, and as executor, transferred certain funds to himself as trustee, and to secure these funds executed a deed to himself, as trustee, conveying certain lots in Baltimore city, but failed to place the conveyance on record. After his death a creditor's bill was filed, and these lots were sold. The parties for whose benefit the unrecorded deed was executed claimed the proceeds of the sales of the lots conveyed thereby, and these proceeds were allowed to them. They afterwards filed a bill in equity against the sureties on Carson's bond as executor, but this court held that common sense and common justice require that, having claimed and having received the entire proceeds of the sale of the property conveyed by the unrecorded deed upon the express ground that it was executed by Carson to secure the complainants on account of the money belonging to them, and which he held as trustee under the will, they should not be permitted to deny those facts in a suit brought against the sureties on the administration bond." And so in the still more recent case of *Fisher* v. *Boyce*, 81 Md. 46, it appeared that the will of James Boyce was duly admitted to probate by the orphans' court of Baltimore county; that thereupon the executors filed a bill in equity against all the parties interested in the estate of the decedent, asking the court to construe the will, and to assume jurisdiction over the administration and settlement of the entire estate. This bill was answered by all parties in interest, including those who subsequently sought to caveat the will. In those answers the defendants (two of whom were the same persons who afterwards assailed the will by caveat) unequivocally admitted the due execution, publication, and probate of the will. Later on, the circuit court, by its decretal order, assumed jurisdiction of the whole estate and of its administration. Afterwards one of the defendants filed a petition in the equity case, claiming that she was entitled under the will, to certain income, and praying an allowance under the will for her maintenance pending the settlement of the estate. This petition was answered, and both petition and answer were heard upon proof adduced, and finally the petition was dismissed by the court. Two years later two of the defendants in the equity proceeding filed in the orphans' court a caveat to a part of the will, and upon appeal this court held they were estopped to question its validity. They had taken a beneficial interest under the will, whose validity they formally and solemnly asserted, and they were thereafter prohibited from setting up any adverse right, which, if successfully asserted, would have defeated the full operation of the instrument. And so in *Keedy* v. *Long*, 71 Md. 385, 5 L. R. A. 759, it was held that, where a person had two alternative remedies open to him, and proceeded upon one to a final judgment, he would be precluded from resorting to the other one afterwards. And to the same effect is *Olmstead* v. *Bach*, 78 Md. 132, 22 L. R. A. 74. It will be observed, and must be borne in mind, that in all these and similar cases, it was not the mere institu-

tion of a suit, which was abandoned before a final judgment had been reached, that operated to estop the prosecution of a subsequent suit between the same parties, and founded on the same cause of action, but that it was the selection by the plaintiff of one of two remedies that were open to him, and a decision thereon by a competent tribunal, that precluded a resort to the other inconsistent remedy. The obvious principle which underlies this class of cases must therefore be that, when a party has deliberately selected his form of action, and pursued it to a final judgment,—and whether that judgment be for or against him is wholly immaterial,—he shall not be at liberty to again vex the same defendant with another suit in a different form of action, for the identical demand involved in, and passed upon by, the antecedent litigation. Where the remedies are alternative, and not cumulative, his choice of the one, and his pursuit of it to a final judgment, will exclude the other or opposite remedy, and, having thus repudiated the latter, he cannot afterwards ignore the judgment actually rendered, change his position, and adopt the remedy he had repudiated, and repudiate the one he had adopted. Upon the plainest principles of public policy, he "would be absolutely estopped to do this, because a man who obtains or defeats a judgment by pleading or representing an act in one aspect will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject." *McQueen's Appeal*, 104 Pa. 595, 49 Am. Rep. 592. It is an inflexible and invariable rule that, when the cause of action is substantially the same, and is or might be sustained by the same evidence, no change in the form of the suit or of the pleadings shall avail to withdraw a matter, which has once been judicially determined, from the estoppel of the adjudication. Consequently, a judgment in one suit will be conclusive in every other where the cause of action is substantially identical, notwithstanding a change in the form in which the action is brought. But, for this defense to be availing, there must have been a judgment for a discontinuance of the suit, before judgment will create such estoppel. It has been established, both in this country and in England, that, whenever an act is done, or a statement is made, by a party, which cannot be contravened or controverted without fraud on his part, and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere matter of evidence, and it will become binding, even in opposition to proof of a contrary nature. But it is perfectly obvious that the case at bar does not belong to this class of estoppels, for the change in the character of the claim by the appellant has resulted in no fraud or injury. The case of *Farwell* v. *Myers*, 59 Mich. 179, and the case of *Washburn* v. *Great Western Ins. Co.* 114 Mass. 175, both cited by the appellee, sustain our conclusions. In the Michigan case the claimants sold to the defendant goods to the value of $10,000. The defendant, a few days afterwards, executed a deed of trust for the benefit of his creditors, and the vendors sued out a writ of replevin for the goods so sold to the insolvent. Under the writ a portion of these goods, valued at about $4,000, was recovered, but the rest could not be found. The vendors thus got possession of, and retained, the part of the goods which they had replevied. They then filed their account against the insolvent estate for $10,000, less $4,000, the value of the goods replevied. The court held that, having elected by the replevin suit, which went to trial and to final judgment, to rescind the contract, they were bound by that election and could not, in the distribution of the insolvent's estate, treat the contract as in force, after having proceeded in the replevin suit upon the assumption that it had been rescinded. The court held that "by rescinding the sale, and prosecuting to judgment an action of replevin for the goods sold, on the theory that the fraud of the assignor had vitiated the contract, and that they owned said goods, the plaintiffs had elected their remedy, and cannot be allowed to come into court a year afterwards, because of their failure to secure adequate relief in the replevin suit, and base a claim upon the inconsistent idea that the goods were sold to the assignor." It may not be amiss to observe that in *Powers* v. *Benedict*, 88 N. Y. 605, a case quite similar to the one at bar, a conclusion precisely the reverse of that announced in the Michigan case was reached, and the doctrine was recognized that a partial recovery of goods, under a replevin sued out under circumstances such as we have here, did not bar an action for the remainder, or preclude the vendor from filing a claim in the insolvent vendee's estate for the value of the balance of the goods which he failed to recover under the writ of replevin. In the Massachusetts case, where a person filed a bill in equity to reform a policy of insurance by striking out a clause of warranty, and afterwards brought an action at law upon the policy as written, alleging compliance with the warranty, and after a trial on that issue had judgment rendered against him, it was held that he had elected his remedy, and had waived his right to prosecute his bill for the reformation of his policy. And to the same effect are *Sanger* v. *Wood*, 3 Johns. Ch. 416, and *Steinbach* v. *Relief F. Ins. Co.* 77 N. Y. 498, 33 Am. Rep. 655.

The record now before us discloses the fact that the replevin suit was not pressed to trial, and that a judgment was not entered therein. The suit was voluntarily discontinued. To hold that the vendor, by merely suing out the writ, though it (the vendor) subsequently abandoned the proceeding, and paid to the vendee's trustees the value of the goods replevied, forfeited all right to claim payment for these very same goods, would be to stretch the doctrine of election of remedies, and to widen its consequences far beyond any limits heretofore recognized in Maryland. It would, in fact, prescribe as a penalty for a mere mistake in bringing a suit, not the usual one of costs, but the far graver one of a forfeiture of a just and meritorious claim; and its adoption would place a court of equity in the same anomalous situation of being forced to say to a suitor: "You made a mistake in suing out this writ of replevin, but you recognized your error, and promptly discontinued the action. Your mistake has hurt no one, because the trustees have

recovered from you the full value of the goods you took, and the creditors have therefore not been prejudiced. Confessedly, you delivered the insolvent the goods, and confessedly you have not been paid for them. Their value forms part of the insolvent's estate, but, because you inadvertently supposed you had a right to reclaim the goods (though when you discovered you had not such right you abandoned your suit), you shall not receive a dollar of your debtor's estate. You shall not get even a part of the money realized from the very property which you sold and delivered to the insolvent." With equal propriety could a legatee, who, having caveated a will, subsequently dismissed the proceeding without a trial, be deprived of his legacy; but it has been distinctly held that he is not estopped to recover his legacy. *State* v. *Adams*, 71 Mo. 620.

Estoppels must be reciprocal, and bind both parties. They operate only on parties and privies in blood or estate, and can be used neither by nor against strangers. "He that shall not be concluded by the record or other matter of estoppel, shall not conclude another by it." *Alexander* v. *Walter*, 8 Gill, 239, 50 Am. Dec. 688. The trustees of the vendee were not bound by the replevin suit, nor by the vendor's election of that remedy. They brought suit upon the replevin bond, and recovered a judgment for the full value of the replevied property, and this they did upon the claim that the title to the fertilizers had vested in the Waring Manufacturing Company, under the contract of sale with the Bolton Company. In other words, the trustees successfully insisted on the contract of sale being a subsisting, unrescinded contract, notwithstanding the attempted repudiation of it by the Bolton Company. Having recovered a judgment, and having collected the money due under that judgment, upon the hypothesis that the contract was not rescinded, but was in fact in full force, what standing have they, in their capacity as creditors, to object to the payment of the promissory note held by the vendor of those goods for the price at which the goods were sold? Having recovered the value of the goods on the theory that the contract was not rescinded, they object to the payment of the note on the opposite ground, that the contract had been rescinded. This is certainly, as the Scotch say, "to approbate and reprobate." *Re Chesham*, L. R. 31 Ch. Div. 466.

If the doctrine sanctioned in *Thompson* v. *Howard*, 31 Mich. 309, to the effect that it is immaterial whether the plaintiff obtains redress in the first action or not, were adopted, and it were held that the mere fact of bringing a suit in one form of action, though abandoned, without trial or without judgment, forever precluded a resort to any other form of action respecting the same subject-matter, it would, when logically followed out, prevent an amendment from one form of action to another, although the right to make such amendments is expressly given by § 34, art. 75, of the Code. It would prevent such amendments, because, if the mere naked selection of one remedy is such an exclusion of another inconsistent one as to estop the party who had selected the first from ever afterwards resorting to the second, the bare bringing of a suit in one form of action would necessarily preclude a resort, even by way of amendment, to the opposite, or inconsistent, form of action. If the doctrine of *Thompson* v. *Howard* were generalized, it would amount to this: That a litigant elects his remedy in every case, in the first instance, at his peril. If he finds that he has made a mistake, whether in consequence of erroneous views of law or fact, he has nevertheless estopped himself from retracing his steps. He cannot dismiss his suit, and institute a new proceeding, of a different nature, against the same party. But no one supposes that this is the law. *Anchor Mill. Co.* v. *Walsh*, 20 Mo. App. 107.

We hold, then, that the mere fact that the Bolton Mines Company sued out a writ of replevin to recover possession of these goods, and then discontinued the proceeding without trial and before judgment, and without realizing anything by its suit (for it paid the value of the goods to the trustees of the vendee), does not estop it to claim, out of the vendee's assets, payment of the note given by the purchaser for the price of the fertilizers sold. The appellant is consequently entitled to participate with the other creditors of the Waring Manufacturing Company in the funds which the trustees hold for distribution. We therefore reverse the order appealed from.

Order reversed, with costs above and below, and cause remanded for further proceedings.

ALABAMA SUPREME COURT.

W. L. THORNHILL, *Appt.*,
v.
Martin O'REAR.

(.....Ala.....)

1. An agreement by one person to take all the chances on a proposed scheme to raffle off property, thereby eliminating all the elements of chance and fixing a definite price for the property, is not unlawful.

2. The fact that forfeits were deposited on Sunday to bind the parties to an agreement which was invalid because made on that day does not give one of them any right to recover his deposit after the holder has executed the transaction on a subsequent day by delivering the forfeit to the other party before he was notified not to do so.

(January 16, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Walker County in favor

NOTE.—As to lottery schemes, see also People v. Elliott (Mich.) 3 L. R. A. 403, and *note*: Yellowstone Kit v. State (Ala.) 7 L. R. A. 599, and *note*; Ballock v. State (Md.) 8 L. R. A. 671; State v. Boneil (La.) 10 L. R. A. 60, and *note*; Long v. State (Md.) 12 L. R. A. 89.

of defendant in an action brought to recover possession of a watch which defendant had obtained as a forfeit for plaintiff's refusing to carry out a contract. *Affirmed.*

The facts are stated in the opinion.

Mr. **T. L. Sowell,** for appellant:

The contract is void, made so by express statutory declaration.

Ala. Code 1886, §§ 1742, 1749.

It is absolutely and *ab initio* void, and therefore must be a nullity,—must be without legal effect, incapable of conferring right or imposing duty.

Flinn v. *Barber*, 64 Ala. 193.

The appellant is entitled to recover.

Dodson v. *Harris*, 10 Ala. 566; *Wieman* v. *Mabee*, 45 Mich. 484, 40 Am. Rep. 476.

The watches put in the hands of the stakeholder were a wager that the illegal trade would be consummated on Monday.

2 Bouvier, Law Dict. title *Wager;* Burrill, Law Dict.; Webster, Unabridged Dict.

If it was a wager the appellant was clearly entitled to recover his property.

Ala. Code 1886, § 1742; *Trammell* v. *Gordon*, 11 Ala. 656; *Lewis* v. *Bruton*, 74 Ala. 317, 49 Am. Rep. 816.

Messrs. **Coleman & Bankhead,** for appellee:

Where the forfeiture is paid over to the winner by the stakeholder with the consent of the loser the contract becomes executed.

Fisher v. *Hildreth*, 117 Mass. 558; *McKee* v. *Manice*, 11 Cush. 357.

The appellant and appellee being parties to the transaction after the execution of the contract by the consent of appellant they were *in pari delicto.*

Wood v. *Duncan*, 9 Port. (Ala.) 227; *Fisher* v. *Hildreth*, and *McKee* v. *Manice*, *supra.*

If a contract based on a consideration contrary to law has been fully and voluntarily executed, and the parties are *in pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other.

Hill v. *Freeman*, 73 Ala. 200, 49 Am. Rep. 48; *Lea* v. *Cassen*, 61 Ala. 315; *Morris* v. *Hall*, 41 Ala. 510; 2 Kent, Com. p. 467; 1 Brickel's Dig. 377, § 32; *Wood* v. *Duncan*, *supra; Long* v. *Georgia P. R. Co.* 91 Ala. 519; *Farrior* v. *New England Mortg. Secur. Co.* 88 Ala. 279; 9 Am. & Eng. Enc. Law, p. 882.

Haralson, J., delivered the opinion of the court:

All the authorities hold, if money or property be placed in the hands of a stakeholder, to abide the result of a bet, or as a forfeit to bind parties to an illegal contract while it remains in his hands, it may be arrested by the bailor before or after the happening of the event upon which the money is to be paid or the forfeiture depends. While in his hands, it is *in transitu.* He is not a party to the illegal contract, and upon the revocation of his authority, the money or property remains in his hands as a naked trustee for the parties who placed it there. *Wood* v. *Duncan*, 9 Port. (Ala.) 227; *Shackleford* v. *Ward*, 3 Ala. 27, 36 Am. Rep. 435; *Lewis* v. *Bruton*, 74 Ala. 317, 49 Am. Rep. 816; *Ball* v. *Gilbert*, 12 Met. 403; *Fisher* v. *Hildreth*, 117 Mass. 558; *Vischer* v. *Yates*, 11 Johns. 25. But, as was announced in *McKee* v. *Manice*, 11 Cush. 358, "the law seems to have been held, by the authorities, that if after the event is determined the loser pays the money to the winner, or permits, by his assent or silence, the stakeholder, into whose hands the same has been placed, to pay it over to the winner, the loser cannot recover back the same. In such case, the principle is applied that the law will refuse its aid to restore the money to the loser, both parties being *in pari delicto.*" In *Vischer* v. *Yates*, 11 Johns. 25, it was said by Kent, Ch. J.: "If, after the determination of the event against the plaintiff, the money had actually been paid over to the winner with the plaintiff's consent, or perhaps without notice to the defendant to the contrary, the plaintiff could not have sustained an action against the winner to recover back the deposit;" citing *Howson* v. *Hancock*, 8 T. R. 575, in which Lord Kenyon said that there is no case to be found where an action has been maintained to recover the money back again. All the decisions of this court are in line with these authorities, holding, as to suits upon executory contracts founded upon immoral or illegal considerations, they may always be defended on the ground of their invalidity; but that when executed, unless controlled by statute to the contrary, the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, for the reason that, being equally at fault, the law will help neither. *Long* v. *Georgia P. R. Co.* 91 Ala. 522, and authorities there collected.

Section 1742 of our Code provides that all contracts founded in whole or in part on a gambling consideration are void; and any person who has paid any money or delivered anything of value, lost upon any game or wager, may recover such money, thing, or its value, by action commenced within six months from the time of such payment or delivery. If the case before us falls within the influence of that statute, it would be an exception to the rule as to executed contracts to which we have just referred. *Samuels* v. *Ainsworth*, 13 Ala. 366. The facts are, that on Sunday morning, being in the presence of defendant and others, when the subject of raffling came up, the plaintiff stated, that "he believed he would raffle off his dwelling house and lot by chances," stating the proposed scheme, the chances to be 500, at a specified valuation. The defendant said he would take all the chances, to which plaintiff assented, and said he would make out a deed to the house and lot the next day, and deliver it to defendant, when he could pay him the money for it. Both parties agreed at the same time, to put up their watches in the hands of a stakeholder, as a forfeit, to stand by the proposition as made and accepted, which was done. This statement of facts shows that all the elements of chance were eliminated from the contract, which resulted in being nothing more than an offer by the one party to sell the house and lot at a certain price, to be arrived at by calculation, and the acceptance of the offer by the other. There was nothing unlawful in this offer, as made and accepted, if it had been done on any other day than Sunday, but having been made on that day, it was void, and incapable of enforcement. Code, § 1749.

But this suit arises outside the contract of

the sale and purchase of the house and lot, namely, out of the transaction of putting up the watches to secure the fulfilment of this contract. It is said this was a bet or wager, which brings the case under the influence of said § 1742 of the Code. As to this, let us see. A wager is nothing more than a bet, "by which two parties agree that a certain sum of money, or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event." 2 Bouvier, Law Dict. *Wager*. The transaction of putting up the watches was not a wager. It was only a pledge of the good faith of the parties to abide the terms of the agreement, in the shape of liquidated damages for a failure of either to perform his agreement. *Keeble* v. *Keeble*, 85 Ala. 552. If the transaction had occurred on any day but Sunday, the idea of gambling, perhaps, would not have occurred to any one. This suit, it will be borne in mind, is not on the contract. It is in detinue by the plaintiff, who receded from the bargain, against the defendant, who stood by it, and to whom plaintiff's watch, put up as a forfeit, had been delivered. The evidence of plaintiff tended to show that on Sunday, the day of the transaction, shortly after it occurred, he notified the stakeholder that he would not stand by the proposition, and not to deliver the watch to the defendant; that he demanded the watch from the stakeholder, before he delivered it to defendant, and did not authorize him to deliver it to him; and that on Monday or Tuesday following, plaintiff told defendant he would not abide the proposition made on Sunday before, and wanted his watch, which defendant refused to deliver to him. On the part of defendant it was shown that plaintiff did not notify him of his intention not to abide the transaction of Sunday, until after the watch had been delivered to him by the stakeholder, and further, that the next day, Monday, plaintiff told the stakeholder it was defendant's watch, and to turn it over to him, which he accordingly did, and that after he had turned it over to defendant, plaintiff told the stakeholder not to give it to defendant, when he notified him that he had already turned it over to him. The attempt of plaintiff here is to recover this property because the agreement of forfeiture was entered into on Sunday. It could not, as we have shown, have reference to any illegality growing out of the proposed raffles which was afterwards abandoned. The condition on which the forfeit was to be delivered to defendant had taken place. No delivery was made on Sunday, but on Monday or Tuesday following, and thereby, as between the parties to the transaction, it became executed. Whatever element of illegality, if any, there may have been in putting up the forfeiture, in the beginning, on Sunday, the plaintiff was as much to blame for as defendant, and if the watch was delivered according to the terms of the agreement of forfeiture, that agreement became executed, and plaintiff, in a suit in detinue for the property itself, is in no condition to ask the law to reclaim it from the predicament in which he contributed to place it. It is only in suits on contracts, void under the statute for having been made on Sunday, that the defense of invalidity for having been executed on that day can be made, if the contract remains unexecuted. If one buy a horse on Sunday, and it is delivered and paid for, it could hardly be contended that either party could sue the other, the one for the horse, or the other for the money he paid for it, because the transaction occurred on Sunday. *Black* v. *Oliver*, 1 Ala. 450, 35 Am. Dec. 381; *Windham* v. *Childress*, 7 Ala. 357; *Walker* v. *Gregory*, 36 Ala. 184; *Morris* v. *Hall*, 41 Ala. 536; *Long* v. *Georgia P. R. Co.* 91 Ala. 522. If this suit had been brought in proper form against the stakeholder, and the proof showed that he was notified not to deliver the watch before he did so, a case different from the one we now have would be presented.

It follows from what we have said that under the evidence in this case the plaintiff was not entitled to the general charge as requested. Nor was there any error of which plaintiff can complain, in giving those charges requested for defendant.

Affirmed.

CALIFORNIA SUPREME COURT.

Alexander McBEAN, *Appt.*,
v.
City of FRESNO *et al.*, *Respts.*

(.....Cal.....)

1. A city may contract for the disposal of sewage from the outfall of sewers although this is outside the corporate limits.

2. The liability incurred by a city contract to pay an annual sum during a period of years for the disposal of sewage is, within the meaning of a constitutional provision that any liability "exceeding in any year the income and revenue provided for it for such year" shall be void, to be deemed the amount annually payable, and not the aggregate for the whole time of the contract.

3. A contract by a municipal board extending for more than one year or beyond the term of office of the board which makes it, if it is fair, just, and reasonable, prompted by

NOTE.—On the question, What constitutes indebtedness of a municipality within the meaning of provisions limiting the amount thereof? see *note* to Beard v. Hopkinsville (Ky.) 23 L. R. A. 402, and also the case of Saleno v. Neosho (Mo.) 27 L. R. A. 769.

As to the limitation of municipal indebtedness in general, see also Rainsburg v. Fyan (Pa.) 4 L. R. A. 336; Brooke v. Philadelphia (Pa.) 24 L. R. A. 781, and Linn v. Chambersburg (Pa.) 25 L. R. A. 217.

As to the validity of contracts made by officers for a period beyond their term of office, see *note* to Shelden v. Fox (Kan.) 16 L. R. A. 257.

See also 36 L. R. A. 228.

the necessities of the situation or in its nature advantageous to the municipality, is not invalid as a surrender or suspension of the legislative power of the municipal authorities.

(March 25, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Fresno County in favor of defendants in an action brought to recover the contract price for services rendered in disposing of sewage for defendant city. *Reversed.*

The facts are stated in the opinion.

Messrs. **E. D. Edwards** and **W. C. Graves,** for appellant:

Decisions in our supreme court in passing upon the provision of our Constitution have, as interpreted by Dillon, construed it to mean that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability in any one year shall be paid out of the income or revenue of any future year.

Dill. Mun. Corp. 4th ed. § 134*a*.

When in such cases a municipality contracts for work and labor its debt or liability for payment does not arise until the work is done or the labor performed under the contract.

Crowder v. *Sullivan*, 128 Ind. 486, 13 L. R. A. 647; *East St. Louis* v. *East St. Louis Gaslight & C. Co.* 98 Ill. 430, 38 Am. Rep. 97; *Weston* v. *Syracuse*, 17 N. Y. 113; *Garrison* v. *Howe*, 17 N. Y. 465; *Vincennes* v. *Citizen's Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485.

If there is no debt or liability to pay except as each year's work is performed under the contract, the city can and will easily make provision out of each year's income and revenue for the payment for that year's debt.

Grant v. *Davenport*, 36 Iowa, 396.

The provisions which prohibit a municipal corporation from legislating future restrictions to its own legislative power are not applicable to a time contract entered into by such a corporation.

Indianapolis v. *Indianapolis Gaslight & C. Co.* 66 Ind. 396; *Weston* v. *Syracuse*, 17 N. Y. 110; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Atlantic City Waterworks Co.* v. *Atlantic City*, 48 N. J. L. 378.

There is no limitation as to time of making contracts upon the city of Fresno in its charter or the Constitution of this state.

In the absence of such limitation the board are bound by no rule other than an honest and fair exercise of the discretion reposed in them.

Cook v. *Racine*, 49 Wis. 243; *Riehl* v. *San José*, 101 Cal. 442; *San Francisco Gaslight Co.* v. *Dunn*, 62 Cal. 585; *Territory, Woods,* v. *Oklahoma*, 2 Okla. 158.

Mr. **L. W. Moultrie,** for respondents:

The common council had no authority to provide for the creation of a debt to arise in the future, any more than to create a debt directly and *in præsenti.*

Wallace v. *San José*, 29 Cal. 181.

The framers of the Constitution meant that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such city.

San Francisco Gas Co. v. *Brickwedel*, 62 Cal. 641; *Shaw* v. *Statler*, 74 Cal. 258.

A claim could not be allowed or paid out of the funds of a subsequent fiscal year.

Schwartz v. *Wilson*, 75 Cal. 502; *Smith* v. *Broderick*, 107 Cal. 644; *Sutro* v. *Pettit*, 74 Cal. 332.

This whole contract obligation is a liability to the full extent of the whole period.

Niles Waterworks v. *Niles*, 59 Mich. 312; *Smith* v. *Newburgh*, 77 N. Y. 131; *Springfield* v. *Edwards*, 84 Ill. 626; *Prince* v. *Quincy*, 105 Ill. 138, 44 Am. Rep. 785.

By entering into a five-year contract the city trustees surrendered or bargained away their legislative or governmental powers and duties.

Oakland v. *Carpentier*, 13 Cal. 540; Dill. Mun. Corp. § 97; *People* v. *Johnson*, 6 Cal. 499; *Nougues* v. *Douglass*, 7 Cal. 65.

The inability of a business corporation to avoid its obligation upon the plea of *ultra vires* when it has received and retained the consideration for its obligation has no application to a municipal corporation.

Von Schmidt v. *Widber*, 105 Cal. 151; *Young* v. *Independent School Dist. No. 47, Bd. of Edu.* 54 Minn. 385; *Gutta Percha & R. Mfg. Co.* v. *Ogalalla*, 40 Neb. 775.

Henshaw, J., delivered the opinion of the court:

The city of Fresno duly and regularly, so far as form and procedure are concerned, entered into a contract with plaintiff by which plaintiff agreed to take care of and dispose of the sewage of the city for the period of five years for the sum of $4,900 per annum, payable quarterly. Plaintiff was required to give, and did give, a bond in the sum of $10,000, to which extent he agreed to reimburse the corporation for any liability or loss it might incur or suffer by reason of a faulty performance of his contract. No natural means were available to Fresno for the disposition of its sewage. It had provided sewers, but had made no provision for the care of their contents. These were to be discharged beyond the city limits. But, before the sewers could be used, a sewer farm was necessary for the reception and treatment of the waste matter. The city had secured no such farm. Under these circumstances, the contract with McBean was entered into. He made the necessary expenditures, and year by year performed his contract according to its letter and spirit. Each year, in turn, the city levied, collected, and apportioned to the sewer fund a tax to cover the yearly amount due McBean, and duly audited and paid his demands on the fund. This continued for three years. During the fiscal year ending May 31, 1894, plaintiff performed his contract, but the city refused payment upon the ground that the contract was void. McBean then instituted this action, charging in the first count, for the value of labor and services furnished at defendant's request, and, in the second, pleading at length and standing upon the contract in question. He also averred that there was in the sewer fund, not otherwise appropriated, and available for the payment of his demand, more than $3,000, and such is the undisputed fact. Indeed, none of these facts is disputed. Upon the trial most of them were admitted under stipulation, and others proved without conflict. The court sustained a general de-

murrer to the second cause of action. At the close of plaintiff's case a motion for nonsuit upon the cause of action in assumpsit was made and granted. These two rulings are the errors complained of.

Against the validity of the contract, the first objection urged is that the city had no power to enter into this contract for the care and disposition of its sewage, because "it has no reference whatever to the sewage within the city, but provides for the care and disposal of the sewage from the outfall of the sewers some distance from the city." We see no force in this objection. Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether, by possibility the power had been expressly denied. In the case of the city of Fresno, a city of the fifth class, the power is, however, expressly conferred. "The board of trustees shall have power to establish, construct, and maintain drains and sewers." Municipal Corporation Bill, § 764, subd. 5. Disposition of the outfall is an essential part of the maintenance of a sewer system, and it must often be necessary for inland cities to arrange for that disposition without their corporate limits. *Coldwater* v. *Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

But the controlling questions presented by this contract for determination are: (1) Does it violate the Constitution and charter of the city of Fresno? (2) Does it operate as a surrender or suspension of the legislative powers of the trustees of the city? The Constitution provides (art. 11, § 18): "No . . . city . . . shall incur indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for it for such year, without, etc. . . . Any indebtedness or liability incurred contrary to this provision shall be void." The charter of the city of Fresno provides, in terms harmonious with those of the Constitution: "The trustees shall not create, audit, allow, or permit to accrue any debt or liability in excess of the available money in the treasury that may be legally apportioned and appropriated for such purposes, etc." Stat. 1883, p. 255. The charter of the city of Fresno authorizes the levying and collecting of a tax, not exceeding 10 cents on each $100, for the sewer fund. Municipal Corporation Bill, § 764, subd. 9. No question is here presented but that the text which may thus be collected is ample for the payment of the sums due or to become due to plaintiff under his contract, and the question of the validity of the contract is free from any embarrassment from this consideration. In the constitutional provision under consideration, the framers had in mind the great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenue of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers. It was to prevent this abuse that the constitutional provision was enacted. In *San Francisco Gas Co.* v. *Brickwedel*, 62 Cal. 641, and in *Shaw* v. *Statler*, 74 Cal. 258, the question is discussed, and the interpretation of the constitutional provision laid down, and the reason for it given. Each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year. The taxpayers of municipalities are thus protected against the improvident creation of inordinate debts, which may be charged against them and their property in ever-increasing volume from year to year, until he who is without any property may be in a better financial situation than one who owns much.

Upon the other hand, the correlative rights of a creditor of the city, under these circumstances and under the law, have been recently set forth with exactness and clearness by Mr. Justice Harrison in *Weaver* v. *San Francisco City & County* (Cal.) 43 Pac. 972: "Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice also that he can receive compensation for his labor or materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished, and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation and are subject to the same limitations, as he is. Even though, at the time of making his contract, there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city; and if others, whose claims have accrued subsequent to his, are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. He acquires no claim in the nature of a lien upon these funds for the amount of his demand, nor is there any legal obligation upon the municipality, any more than upon any other debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order, and in such condition and with such formalities as entitle the claimant to immediate payment. In dealing with the municipality, he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenue provided for that year, and as a prudent man, he will ascertain, not only the amount of that income, but also the amount of the claims already existing and of those that are likely to be incurred."

In the case of contracts extending over a period longer than one year, it may be readily seen that the municipality is abundantly protected, and that it is the contractor therewith who subjects himself to peril and risk or loss. If there are not revenues for any given year sufficient and available for the payment of his claims for that year, those claims become waste paper, and are not carried over as a charge against the income, and the revenue of a succeeding year. This determination of the law in this state removes a potent objection found by the supreme court of Michigan to sustaining a contract under a law similar to

our own, where the life of the contract was for several years. Says the court: "There can be no doubt, in our opinion, that this whole contract obligation is a liability to the full extent of the thirty years rental; and it is equally clear that all unpaid sums would be aggregated until paid." *Niles Waterworks* v. *Niles*, 59 Mich. 312.

In this state such a rule would not obtain, and the contract under consideration is left with its validity to be determined primarily as the question is answered. Does it or does it not create a debt or liability for a given year exceeding the revenue of that year? And upon this it may be said, at the outset, that there is a contrariety of opinion in the courts of the states which have been called upon to interpret constitutional or charter provisions similar to or identical with our own. The state of Michigan, as will be observed from the case last cited, holds such contracts to be void, for the reason above quoted. Ohio, New Jersey, Montana, and Oregon have reached the same conclusion, and perhaps other states. *State* v. *Medbery*, 7 Ohio St. 526; *Davenport* v. *Kleinschmidt*, 6 Mont. 502; *Salem Water Co.* v. *Salem*, 5 Or. 29; *Atlantic City Waterworks Co.* v. *Read*, 50 N. J. L. 665.

Upon the other hand, in Illinois, Pennsylvania, Massachusetts, New York, Iowa, Indiana, and Oklahoma (and it may be in others which have not come beneath our notice), it is uniformly held that contracts such as these are not violative of the constitutional inhibition. *East St. Louis* v. *East St. Louis Gaslight & C. Co.* 98 Ill. 415, 38 Am. Rep. 97; *Erie's Appeal*, 91 Pa. 498; *Smith* v. *Dedham*, 144 Mass. 177; *Westen* v. *Syracuse*, 17 N. Y. 110; *Grant* v. *Davenport*, 36 Iowa, 396; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Indianapolis* v. *Indianapolis Gaslight & C. Co.* 66 Ind. 396; *Territory, Woods*, v. *Oklahoma*, 2 Okla. 158.

In a certain very restricted sense it may be said that a liability is created by a contract such as this; but to call it a present liability for the aggregate amount of the payments in the contract contemplated thereafter to be made is not legally permissible. A liability to the city would arise upon breach of contract, but the Constitution never meant to protect the city from the consequences of its own wilful and tortious acts. A liability might arise against the city for the negligence of its officers, and the damages due to an individual who had suffered therefrom might be great; but such liability for a municipal wrong the Constitution never meant to protect against. When we come to consider the contractual relations between the city and appellant, it is at once seen that the city cannot be liable in any one year for more than $4,900, an amount far within the revenue derived to the sewer fund, and further that it cannot become liable for this amount at all until faithful service rendered by the contractor each year. If the city, in any one year, should fail to collect into its sewer fund money sufficient to pay the just claims of the contractor, then, as above said, it would be the contractor's loss, the city would be chargeable with no financial responsibility therefor, and the result, at the most, so far as it was concerned, would be a failure upon the part of its officers to observe good faith in their own dealings. There need be here no struggles with the niceties of definitions given to "debt" or "liability." An able discussion of those questions will be found in the case of *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416. We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the instalments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed. These views find abundant support in the adjudicated cases in this state. Article 8 of the former Constitution of California provided that the legislature shall not create any debts or liabilities in any manner which shall exceed the sum of $300,000, except under certain specified contingencies. The state made a contract for the care of its prison, for convict labor, etc., for the period of five years, agreeing to pay therefor the sum of $10,000 per month. The act came before this court for review in *State* v. *McCauley*, 15 Cal. 429, where the question was elaborately argued, and fully considered by the court. Chief Justice Field, in delivering the opinion of the court, spoke as follows: "The unconstitutionality of the act . . . is asserted on two grounds: First, that it appropriated the sum of $600,000, and thus created a debt or liability against the people of the state exceeding the limit prescribed by the eighth article of the Constitution. . . . The contract provides for the payment of $10,000 a month, and the act appropriates this sum per month. The appropriations are to take effect, and the services are to be rendered in future. Until the services are rendered, there can be no debt on the part of the state. The lessee could not have claimed, at any time after the making of the contract, the aggregate of all the monthly instalments,—because the state never owed him that amount. The state only became indebted as the services were each month performed. . . . The 8th article was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury. The appropriation of the moneys, when received, meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the services operates in fact in the nature of a cash payment." This interpretation, after further consideration and argument, was reaffirmed in *People, McCauley*, v. *Brooks*, 16 Cal. 11, and again in *Koppikus* v. *State Capitol Comrs.* 16 Cal. 248. In *People* v. *Arguello*, 37 Cal. 524, it is said: "A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened."

These decisions being before the framers of the present Constitution, under familiar rules of interpretation it will be held that their enactment of similar provisions was made in the light of them. *Wallace* v. *San José*, 29 Cal. 181, is not in conflict with these decisions. The contract there contemplated a payment which

might become a debt in the year in which the contract was executed, as well as in some future year. Under the peculiar language of the charter, which forbade the creation of any debt unless the money was actually in the treasury to meet it, it was declared that the council had no authority to provide for the creation of a debt to arise in the future, any more than to create one directly and *in præsenti*.

Upon the second proposition, namely, whether or not the contract operates as a surrender or suspension of the legislative powers of the trustees of the city, it is to be observed that there is in this state no inhibition against the making of a contract by a municipal board which shall extend for more than one year, or even beyond the term of office of the board which makes it. If the legislature desired to restrict municipalities in this particular, it could easily do so by the passage of a law, such as exists in some other states, declaring void any contract upon the part of a municipality which is to extend beyond the current fiscal year, or beyond the term of office of the authorities which enter into it. But, even in the absence of such provisions, courts look with disfavor upon contracts by municipalities involving the payment of moneys which extend over a long period of time—First, because such contracts, in their nature, tend to create a monopoly in favor of the other party thereto for supplying the city with the article contracted for; second, because they may involve an undue restraint upon the legislative powers of the successors of the board, and prevent those successors from availing themselves of a change in the times, of opposition, of reduced rates, or other causes operating legitimately to decrease the price of the commodity, of which decrease in price the city, by reason of its contract, cannot avail itself. There is thus, by law and reason, a well-defined limit set to such contracts. In the absence of any other objection to them, they will not be upheld, in the absence of a clear showing of a reasonable necessity for their execution. But if, on the other hand, it be made to appear that, at the time the contract was entered into, it was fair and just and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality, then such a contract will not be construed as an unreasonable restraint upon the powers of succeeding boards. In *San Francisco Gaslight Co.* v. *Dunn*, 62 Cal. 585, this court says: "In the absence of an express limitation as to the period of time for which a contract may be made, we would hold, perhaps, that the contract with the plaintiff for five years was not beyond the power of the supervisors." In *Riehl* v. *San José*, 101 Cal. 442, an action was brought to set aside a contract for five years, made by the city with an electric company for the lighting of its streets. The complaint sounded in fraud, and further declared that the contract was against public policy, illegal, and void. The contract was upheld, it being found that there was no fraud, and that the "members of the common council . . . acted as honest men, and exercised their honest discretion for the best interests of the city."

We have here, then, a contract made for a purpose expressly authorized by the charter, a contract which looked to supplying the city with an absolute need, a contract which pertained to the ordinary expenses of the city, and, together with other like expenses, was well within the limit of the current revenue authorized by its charter annually to be provided for this specific purpose. The term of the contract was fair, indeed, in view of the considerable expense which the evidence showed plaintiff was obliged to undergo to fulfil his undertaking. Under these circumstances, we hold the contract to be valid, operative, and binding upon the city.

The judgment and order are reversed, and the cause remanded, with directions to the trial court to overrule defendants' demurrer.

We concur: **McFarland, J.; Garoutte, J.**

MISSOURI SUPREME COURT.

STATE of Missouri, *ex rel.* LACLEDE GAS-LIGHT COMPANY,
v.
Michael J. MURPHY, Street Commissioner of St. Louis.

(130 Mo. 10.)

1. The right to lay electric-light wires in the streets of a city by virtue of a franchise to lay pipes, fixtures, or other things for the purpose of lighting the city, is subject to the municipal control of the streets and general police power regulating and restricting the manner in which such wires, tubes, and cables may be secured or supported and insulated,—especially when the franchise was given before the use of electricity for such purposes was known.

2. It is a matter of common knowledge that electricity is used for the purpose of trans-

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NOTE.—*Police regulation of electric companies.*

I. *In general.*
II. *As to the occupation of highways or waters.*
III. *As to guard wires.*
IV. *As to the operation of electric lines.*
V. *Limitations of the police power.*
  a. *Limitations in state Constitutions.*
    1. *Impairment of obligation of contracts.*
    2. *Deprivation of property without due process of law.*
    3. *Class legislation.*
  b. *Limitations in Federal Constitution.*
    1. *Statutes requiring electric wires to be put underground.*

V.—Continued.
    2. *Statutes imposing penalties upon telegraph companies for not transmitting and delivering messages properly.*
    3. *Statutes regulating telephone prices and requiring service on equal terms to all.*
    4. *Statutes imposing license fees on telegraph companies.*

I. *In general.*

That the regulation of electric lines is within the range of police regulations is perfectly obvious on the briefest consideration of the nature of police

31 L. R. A.

See also 36 L. R. A. 114.

mitting sound by telephone and messages by telegraph, and also for generating light and producing power.

(June 18, 1895.)

APPLICATION for a writ of mandamus to compel defendant as street commissioner of St. Louis to permit relator to lay electric wires under a certain street in that city. *Denied.*

The facts are stated in the opinion.

Messrs. **Henry Hitchcock, G. A. Finkelnburg,** and **Isaac H. Lionberger,** for relator:

If the state of Missouri has invested relator with certain powers and franchises, among which is the right to light the city of St. Louis, and to make and vend gas lights and other lights, including electric lights, and to that end to lay down "all pipes, fixtures, or other things properly required," then the city of St. Louis cannot by any ordinances or requirements on its part annul or destroy those franchises, nor can it impair or abridge them, nor can it impose substantial burdens and conditions upon their exercise, not imposed by the state itself.

Relator, its stockholders, and all those who have invested in relator's securities, have vested rights which cannot be substantially abridged or disturbed by the state itself, much less by

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power. The police power is the power of the legislature representing the body of the citizens to enforce the maxim "*sic utere tuo ut alienum non lædas.*" "We think it is a settled principle," says Chief Justice Shaw, "growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." Com. v. Alger, 7 Cush. 84.

"The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state." Redfield, Ch. J., in Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625.

"The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Cooley, Const. Lim. p. 572, 6th ed. p. 704.

Under the reserve powers of the state, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the state for the good order, peace, and protection of the community. The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation—that the state does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation, it may make all necessary provisions with respect to the buildings, poles, and wires of electric companies in its jurisdiction which the comfort and convenience of the community may require. Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, Reversing 1 Am. Elec. Cas. 632, 95 Ind. 12, 48 Am. Rep. 692.

"The police power is so varied and comprehensive that an exact definition, as applicable to all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized, in particular cases, are quite numerous, as well as various in their application to our complex system of government. This . . . power . . . embraces the entire system of internal state regulation, having in view, not only the preservation of public order and the prevention of offenses against the state, but also the promotion of such intercourse between the inhabitants of the state as is calculated to prevent a conflict of rights, and to promote the interests of all. It is a power inherent in every sovereignty, and is, in its broadest sense, nothing more than the power of a state to govern men and things within the limits of its own dominion." Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201.

This general power of police regulation in respect to electric wires is exercised in some states by statutes expressly providing for insulation of electric wires and other modes of preventing injuries therefrom.

A city ordinance prohibiting the suspension of electric wires over or upon the roofs of buildings, or the suspension or support of such wires upon any building unless it was to supply some occupant of the building with electric light or power or the facilities for using the wire in telegraph or telephone service, was contested in Electric Improv. Co. v. San Francisco City & County, 45 Fed. Rep. 593, 13 L. R. A. 131, but was sustained by the court. Sawyer, J., in his opinion said: "That the stretching of these wires over buildings in the manner practiced, as shown by the evidence, no one, I think, can doubt after reading the affidavits, is extremely dangerous, both as being liable to originate fires, and as obstructions to the extinguishment of fires otherwise originated. Indeed, the danger is a matter of common knowledge. We might almost as well require strict proof of the danger of storing gunpowder, or dynamite, in, under, upon, or about our houses. . . . It is certainly competent, under the police powers of the state, to suppress such dangerous erections in the interest of the common safety of the community. Who can say, in view of the constant and perpetual menace, that the provisions of this ordinance are unreasonable?"

II. *As to the occupation of highways or waters.*

The regulation of the occupation and use of the highways is a well-recognized exercise of the police power of the state. The highways within and throughout the state are constructed either by the state itself, or by municipalities through delegated powers from the state, which has full powers to provide all the proper regulations of police to govern the actions of persons using them and to make from time to time such alterations in these ways as the proper authorities shall deem best. Cooley, Const. Lim. p. 588.

The most wide-reaching application of the police power to the regulation of the occupation of the highways by electric lines is the enactment of statutes by which the municipal authorities are given the right to regulate the erection and maintenance of electric lines on the highways. Statutes of this nature have been passed in almost every state, and are intended to delegate to the local municipal authorities such portion of the police power of the state as to designate the place in the highway which the pole shall occupy, and the number and height of the poles, and number of wires to be used, as shall, in their opinion, secure the least possible inconvenience to the

the municipal authorities of the city of St. Louis.

State, St. Louis, v. *Laclede Gaslight Co.* 102 Mo. 472; *State, Haevssler*, v. *Greer*, 78 Mo. 188; *Sloan* v. *Pacific Railroad*, 61 Mo. 24, 21 Am. Rep. 397; *Scotland County* v. *Missouri, I. & N. R. Co.* 65 Mo. 123; *Weston* v. *Charleston*, 27 U. S. 2 Pet. 449, 7 L. ed. 481; *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Louisville Gas Co.* v. *Citizens Gaslight Co.* 115 U. S. 683, 29 L. ed. 510; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516.

Relator cannot comply with the requirements now made by the city of St. Louis, or accept the ordinance in question, without a virtual surrender of its charter.

Police regulations must have some reference to the comfort, safety, or welfare of society. They must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter, or curtailment of the corporate franchise.

State, Haeussler, v. *Greer*, *State, St. Louis*, v. *Laclede Gaslight Co.*, *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.*,

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traveling public. See statutes collected in Croswell on Electricity, chap. 6.

The right to exercise this police power is inferable from the general power given to municipal governments to regulate the use of the streets, even when it is not especially conferred upon them by the direct terms of a special statute. Dill. Mun. Corp. § 691.

And the courts have uniformly held that it is a valid and proper exercise of the police power of the state. American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454; United States Illum. Co. v. Hess, 19 N. Y. S. R. 883; H. Clausen & Sons Brewing Co. v. Baltimore & O. Teleg. Co. (N.Y. Sup. Ct.) 2 Am. Elec. Cas. 210; People, New York Electric Lines Co., v. Squire, 107 N. Y. 593; United Lines Teleg. Co. v. Grant, 137 N. Y. 7; State, Wisconsin Teleph. Co., v. Janesville Street R. Co. 87 Wis. 72, 22 L. R. A. 759; Mutual U. Teleg. Co. v. Chicago, 16 Fed. Rep. 309; Allentown v. Western U. Teleg. Co. 148 Pa. 147.

The reason of this is obvious. The primary and fundamental object of all public highways is to furnish a passageway for travelers in vehicles, or on foot, through the country. Bouvier, Inst. § 442.

They were originally designed for the use of travelers alone. But in the course of time and in the interest of the general prosperity and comfort of the public, they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use. Thus they have been appropriated in recent times for the reception of sewer, water pipes, gas pipes, pipes for heating and manufacturing purposes, underground railroads, trenches for wires for telegraph, telephone, and other purposes, which all require in their construction the disruption of the pavements, and the temporary interruption, at least, of the rights of travelers in the public highways. The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities is pre-eminently a police power, and it is within the legitimate authority of a legislature to delegate its exercise to municipal corporations. People, New York Electric Lines Co., v. Squire, *supra*.

Under such statutes, the municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected, and how they shall be planted and secured. American U. Teleg. Co. v. Harrison, 31 N. J. Eq. 627; Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 32.

And also allow a change in the line if it becomes necessary in reconstructing the street. Monongahela v. Monongahela Electric Light Co. 12 Pa. Co. Ct. 529.

The improvement of the streets, and what is necessary to complete a given improvement thereof, are matters solely within the control of the municipal corporation, and even the court can interfere only where there is fraud, corruption, or oppression. *Ibid.*

Where a street is graded, and a vitrified pavement is being laid, whether the poles of an electric-light company should be allowed to stand in the line of the curb, and make a break therein and project out into the angle of the brick and curbstone which forms the water table, or should stand back of the curb line, leaving the curb continuous, and the water table free and unobstructed, is a question solely within the jurisdiction of the city councils, and from their decision there is no appeal by such a private corporation whose occupancy and use of the street are adverse to and not for the benefit of the traveling public. *Ibid.*

The plenary power of the state on this subject includes the power to deny to any form of electric use the right to occupy the highways, if, in the opinion of the state officials, such occupation is not for the public interest, except so far as this denial may be in conflict with the Federal Constitution, which is the case, as will be seen later, in regard to telegraphs, and possibly telephone lines. American U. Teleg. Co. v. Harrison, and Wisconsin Teleph. Co. v. Oshkosh, *supra*.

This power of denial of the right to occupy is, with the exception just stated, generally delegated to municipal authorities with a view to the proper care of local interests, and is implied without express words in the general powers of regulating and caring for the streets and highways. In the case of electric-light and electric-railway companies, it would seem that, in the absence of inconsistent statutory provisions, the municipal authorities might, in their discretion, wholly refuse an application for leave to occupy the streets. This point was considered in a case in which an electric-light company sought for a writ of mandamus to compel the board of aldermen of a city to grant a location for its poles. The company based its application upon a statute granting to telegraph companies the right to set their poles in the highway, subject to the designation of place by the aldermen, and upon a later statute providing that the acts relating to telegraph companies should, so far as applicable, extend to lines for the transmission of electricity for the purpose of lighting. The court decided that the mandamus should not issue, placing the refusal upon either of two grounds. In the first place, that the matter of granting locations was left to the discretion of the aldermen of the city or the selectmen of the town, and that they might refuse wholly to grant such location, in cases where it would interfere with public travel on account of the narrowness of the street, or for other reasons; and second, that even if it were considered imperative upon the municipal authorities to grant such location to telegraph companies, yet the reason for an imperative construction of this statute would not apply to electric-light companies; that telegraph companies must in almost all cases run from town to town, and through different towns, and therefore it might be considered imperative that their

and *Louisville Gas Co.* v. *Citizens Gaslight Co. supra.*

Mr. **W. C. Marshall,** for respondent:

The legislature could not grant to the Laclede Gaslight Company the right to authorize any one else to use streets and highways, for such an act would be clearly a delegation of the power vested in the legislature to a private and quasi-public corporation, and in conflict with the rights of the city of St. Louis, under the act of 1865.

St. Louis v. *Russell,* 116 Mo. 248, 20 L. R. A. 721.

A similar question arose in *New York, New York Electric Lines Co.*, v. *Squire,* 145 U. S. 175, 36 L. ed. 666, 14 Daly, 154, 107 N. Y. 593, where the court said the state law of 1885 simply transferred the reserved police power of the state from one set of functionaries to another, and required the company to submit its plans and specifications to the latter, who would determine whether they were in accordance with the terms of the ordinance giving it the right to enter and dig up the streets of the city, and being so construed it violates no contract rights of the company which might grow out of the permission granted by the municipality.

The said act of 1886 comes within the principles settled in *Charlotte, C. & A. R. Co.* v. *Gibbes,* 142 U. S. 386, 35 L. ed. 1051, and is not

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locations should be granted by the selectmen of every town through which they should pass: but the same reason would not apply to electric-lighting companies, whose operations are usually confined to a single town or part of a single town, and are of local interest merely; and that so far as electric lighting companies are concerned, it must be taken to be the intent of the statute that the authorities of the town to which, ordinarily, the whole business of the electric-lighting company is confined should have the right to say whether or not any location of poles should be granted. Suburban Light & P. Co. v. Boston, 153 Mass. 200, 10 L. R. A. 497.

This power of denial, however, is not vested in the municipal authorities if it is inconsistent with express statutory provisions (Suburban Light & P. Co. v. Boston, *supra*), as, for instance, in the case of telegraph lines, which in most states are directly granted a right of way by statute, and only the regulation of the use of this right of way is left to the city or town. The state statutes granting this right of way to telegraph companies (cited in Croswell on Electricity, p. 53) are generally copies of, and are all intended to conform to, and give local sanction to, the act of Congress which will be discussed hereafter, which gives telegraph companies the right of way over all post roads of the United States. The conflict between the police power of the state and the Federal Constitution in this regard will be considered later.

The statutes which delegated this police power of regulating the occupation of the highways by electric companies to the various municipalities, were generally enacted before the advisability of putting electric wires underground had been developed by the great increase in the number of such wires, but there are at the present time many states in which statutes expressly giving municipal authorities the right to regulate underground wires have been enacted. Such is the case in Indiana, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, and Vermont. See Croswell on Electricity, §§ 163-165. These statutes are either premissive in their form, giving the electric companies the right to put their wires underground if they desire, as in Indiana, Kansas, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, and New York, or mandatory, as in Maryland, Massachusetts, Ohio, and Vermont, or both, as in some of the states above cited.

The necessity of these acts sprung out of a great evil, which, in recent times, has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation, not only of the surface and air above the streets, but indefinite space under ground. This evil had become so great that every large city was covered with a net work of cables and wires attached to poles, houses, buildings, and elevated structures, bringing danger, inconvenience, and annoyance to the public. Extensive spaces under ground were also required to lay pipes and build trenches and arches, to transact the business of the various corporations requiring them. These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision, to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the several statutes referred to. People, New York Electric Lines Co., v. Squire, 107 N. Y. 593.

These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to by requiring all such wires to be placed under ground in such cities, and be subject to the control and supervision of local officers, who could reconcile and harmonize the claims of conflicting companies, and obviate in some degree the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoined in such a manner as to inconvenience and endanger the general public as little as possible. *Ibid.*

These acts in their general scope have always been held to be a valid exercise of the police power of the state. American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454; United States Illum. Co. v. Hess, 19 N. Y. S. R. 883; H. Clausen & Sons Brew. Co. v. Baltimore & O. Teleg. Co. (N. Y. Sup. Ct.) 2 Am. Elec. Cas. 210; People, New York Electric Lines Co., v. Squire, 107 N. Y. 593; United Lines Teleg. Co. v. Grant, 137 N. Y. 7.

As to questions under the Federal Constitution, see *infra*, V. b.

For license tax for use of streets by electric companies, see also *infra*, V. b, 4.

Another form in which the police power of the state has been exercised upon electric companies is found in the various statutory enactments which provide that when the lines are laid under navigable streams they shall be so laid and maintained as not to obstruct navigation. See statutes; Croswell, Electricity, § 61; Western U. Teleg. Co. v. Inman & L. S. S. Co. 59 Fed. Rep. 365, 20 U. S. App. 247; The City of Richmond, 43 Fed. Rep. 85; Stephens & C. Transp. Co. v. Western U. Teleg. Co. 8 Ben. 502; Blanchard v. Western U. Teleg. Co. 60 N. Y. 510.

Similarly, if a line is put across a draw bridge,

in conflict with the provision of the 14th Amendment that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

Macfarlane, J., delivered the opinion of the court:

On the petition of relator an alternative writ of mandamus was issued by this court, directed to respondent, Murphy, as street commissioner of the city of St. Louis, commanding him to show cause why he should not be required to issue a permit to relator to make an excavation along the east side of Broadway, as near the curb as practicable, and extending from Mound street to Olive street in the city of St. Louis, in so far as such excavation should be necessary for the purpose of laying relator's electric wires under ground. By its petition, relator represents that it is a corporation created under an act of the legislature of the state approved March 2, 1857, and a supplementary and amendatory act approved March 3, 1857, and an amendatory act approved March 26, 1868. These acts are set out in full in the petition. The first, approved March 2, 1857, is entitled "An Act to Incorporate the Laclede Gaslight Company." Laws 1856–57, p. 598. The first section of the act creates James M. Hughes and seven others a body politic and corporate by the style of "The Laclede Gaslight Company,

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the wires must be so arranged as not to interfere with the working of the draw or the passage of vessels. Pacific Mut. Teleg. Co. v. Chicago & A. Bridge Co. 36 Kan. 118.

The propriety of this particular instance of the exercise of the police power of the state over highways has never been questioned, and is obviously valid for the reasons given as to underground wires.

Other forms in which the police power of the state has been exercised in regard to the occupation of the streets by electric wires are the statutes found in a few states as to cutting wires when necessary for moving buildings, giving this power when necessary from the circumstances of the case. Croswell, Electricity, §§ 259–265, and statutes inflicting penalties for injuries to electric lines, posts, or apparatus. Id. § 265, note.

The relative rights of trolley railway companies and the owners of telephone or other electric lines in the use of streets is a kindred subject, but distinct from that of this note, and will be separately treated hereafter; but much can now be found on that question in Cumberland Teleph. & Teleg. Co. v. United Electric R. Co. (Tenn.) 27 L. R. A. 236, and cases there cited.

III. *As to guard wires.*

Considering the dangerous nature of electric wires it would seem to be clearly within the reasonable exercise of police power to require guard wires to be placed between different electric wires where several lines cross each other or hang at different heights along the street. In one case a municipal ordinance requiring such guard wires has been brought in question and sustained. State, Wisconsin Teleph. Co., v. Janesville Street R. Co. 87 Wis. 72, 22 L. R. A. 759. The court says: "The ordinance is reasonable because it requires that to be done which in law and good conscience the defendant (a trolley railroad company) ought to do for the protection of the relator (a telephone company) whose established business it has endangered and disturbed. Second, it is clearly sustained under the police power of the city. . . . There can be no question at this late day but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the street and require all reasonable safeguards for the same."

That a lawfully authorized order or direction of the mayor requiring companies using trolley wires to guard and protect them by what is known as guard wires had been made, is alleged by plea of a telephone company in McKay v. Southern Bell Teleph. Co. (Ala.) *ante*, 589, in which the telephone company sought to escape liability for negligence in respect to its own dangerous wires by asserting that the damage was caused by the trolley company's failure to obey such order as to the guard wires, but this plea was held bad on demurrer.

For cases as to the duty of electric companies to maintain guard wires as a reasonable exercise of care, even when no ordinance or other public regulation has ordered, see *note* to Denver Consol. Electric Co. v. Simpson (Colo.) *ante*, 566.

IV. *As to the operation of electric lines.*

The most important form in which the police power of the state has been exercised upon the operation of electric lines is found in the statutes which regulate the operation of telegraph companies and require them to receive and transmit messages in good faith, with impartiality, and with due care and reasonable dispatch. Such statutes are in existence in most states, and in many cases a penalty is affixed to the nonperformance of the statutory duty. See statutes collected in Croswell, Electricity, chap. 15.

These statutes are valid exercises of the police power, for they are merely statutes which require persons, whether natural or artificial, doing business within the state, to transact that business with fairness, diligence, and impartiality. Western U. Teleg. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692. Rev'd as to interstate business in 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; Western U. Teleg. Co. v. Meredith, 95 Ind. 93. These statutes, however, have been drawn in question in several cases in regard to their extraterritorial force as being in conflict with the exclusive powers of Congress over interstate commerce. This question will be discussed later.

The application of the Sunday law to a telegraph company, although it is a foreign corporation, is sustained in Western U. Teleg. Co. v. Yopst, 118 Ind. 248, 3 L. R. A. 224.

In various other cases which did not expressly decide that Sunday laws were applicable to telegraph business the application of such statutes has been impliedly recognized, as by making the necessity of the message the test of the duty of the telegraph company to receive and transmit it. As illustrations of these cases are Rogers v. Western U. Teleg. Co. 78 Ind. 169, 41 Am. Rep. 558; Western U. Teleg. Co. v. McLaurin, 70 Miss. 26; Thompson v. Western U. Teleg. Co. 32 Mo. App. 191; Burnett v. Western U. Teleg. Co. 39 Mo. App. 599; Bassett v. Western U. Teleg. Co. 48 Mo. App. 566; Western U. Teleg. Co. v. Wilson, 93 Ala. 32; Western U. Teleg. Co. v. Hutcheson, 91 Ga. 253; Millingham v. Western U. Teleg. Co. Id. 449.

Another form of the police regulation of the operation of electric lines is found in the statutes which have been enacted in several states, and which require telegraph companies to make free delivery of messages within a certain limited distance from the central office. Telegraph companies often do this voluntarily, but in some states acts are passed compelling them so to do. Such statutes are found in California, Connecticut, Georgia, Minnesota, Ohio, and Oregon (see Croswell on Electricity, § 417); and under the general rule

and by that name they and their successors and assigns are given perpetual succession," etc. The second section fixed the capital stock at $50,000, and authorized it to be increased to $2,000 000. The third section directs that the affairs of the company shall be managed by a board of not less than five directors, etc. The fourth section authorizes books of subscription for the capital stock to be opened in St. Louis, and, upon the sum of $50,000 being subscribed, provides that the company may organize under this charter. Section 5 provides that said company, its successors and assigns, should, within the corporate limits of said city, not embraced within the limits as established by act of 1839, "have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may be now or hereafter be used as a substitute therefor, and to that end may establish and lay down, in said portion of said corporate limits, all pipes, fixtures, or other things properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company." Section 6 authorizes the city of St. Louis and the company to make any contracts that they may deem to their mutual ad-

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laid down in Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, are undoubtedly a valid exercise of the police power, so far as they do not conflict with the Federal Constitution, which will be considered later.

Another form of police regulation of the operation of electric lines is statutes regulating the prices which the company shall charge for services. In the case of telegraph and telephone lines there have been enacted in several states statutes which fix maximum prices for telegraph and telephone service. This is the case in Florida, Indiana, Maryland, Mississippi, Missouri, Nebraska, New Jersey, Pennsylvania, and Vermont, and statutes with a similar intent as to electric light service exist in many states. St. Louis v. Bell Teleph. Co. 96 Mo. 623, 2 L. R. A. 278; Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201; Central U. Teleph. Co. v. Bradbury, 106 Ind. 1; Johnson v. State, 113 Ind. 143; Central U. Teleph. Co. v. State, Falley, 118 Ind. 194, 123 Ind. 113; State, Webster, v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404. The statutes are cited in Croswell on Electricity, § 319, note.

The validity of this exercise of the police power has been little questioned. It was maintained to its fullest extent in a case in Indiana (Hockett v. State, *supra*,) in which the right of a state to enact maximum charges for telephone service was the point in issue. The court describes the police power of the state in the terms given in the beginning of this note, and adds: "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use to which he has so devoted his property, and he can only escape such public control by withdrawing his grant and discontinuing the use. In support of that conclusion, the court said it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like, and, in so doing, to fix a maximum of charges to be made for services rendered, accommodations extended, and articles sold. . . . The obvious deduction from what has been said, as well as from the authorities cited, is that the power of a state legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete."

The delegation of this power to municipal authorities, however, is not to be easily inferred, but must be by express statute or by necessary inference for the proper exercise of other powers conferred by express statutes, and a mere power given to municipal authorities to "regulate" telephone companies will not confer this right, nor will a general power to pass such ordinances as are for the general welfare of the city, if other specific grants of powers in the charter show that the general welfare clause was intended to include such power. St. Louis v. Bell Teleph. Co. 96 Mo. 623, 2 L. R. A. 278.

A kindred form of the exercise of the police power over the business of electric companies arises in cases where the state or city exacts a license fee from such companies for the use of streets. The nature of this fee has been disputed in several cases. Western U. Teleg. Co. v. Philadelphia, 22 W. N. C. 39; Chester v. Western U. Teleg. Co. 154 Pa. 464, 3 Lanc. L. Rev. 174; Philipsburg v. Central Pennsylvania Teleph. & S. Co. 23 W. N. C. 572; Lancaster v. Edison Electric Illum. Co. 8 Pa. Co. Ct. 178.

It is generally conceded not to be a tax, strictly speaking. Chester v. Western U. Teleg. Co., Lancaster v. Edison Electric Illum. Co., Philipsburg v. Central Pennsylvania Teleph. & S. Co., and Western U. Teleg. Co. v. Philadelphia, *supra;* Philadelphia v. Postal Teleg. Cable Co. 67 Hun, 21.

But to be a true exercise of the police power. Lancaster v. Edison Electric Illum. Co., Western U. Teleg. Co. v. Philadelphia, Philadelphia v. Postal Teleg. Cable Co., Philipsburg v. Central Pennsylvania Teleph. & S. Co., and Chester v. Western U. Teleg. Co. *supra.*

But not to be such an ordinary police power as is incidental to the power of regulating the use and occupation of the highways, but to be so far a special power as to require express delegation by statute from the state to the municipal authorities. Philipsburg v. Central Pennsylvania Teleph. & S. Co. *supra.*

This seems to be the correct view of the case. The fee cannot be considered as a tax, for there is no assessment. It is not based on any valuation of property, and it is not laid merely for revenue, but as a consideration for certain privileges, either of setting poles in the streets, of municipal inspection and care of the same, or for the mere privilege of carrying on business. Philipsburg v. Central Pennsylvania Teleph. & S. Co., Western U. Teleg. Co. v. Philadelphia, Lancaster v. Edison Electric Illum. Co. and Chester v. Western U. Teleg. Co. *supra.*

Considered in this light, it is generally held to be a valid exercise of the police power by a municipality, if such power has been delegated to it by the state. Harrisburg v. Pennsylvania Teleph. Co. 15 Pa. Co. Ct. 518; Lancaster v. Edison Electric Illum. Co., and Philipsburg v. Central Pennsylvania Teleph. & S. Co. *supra;* Postal Teleg. Cable Co. v. Baltimore, 79 Md. 502, 24 L. R. A. 161; Chester v. Western U. Teleg. Co., and Western U. Teleg. Co. v. Philadelphia, *supra.*

But the exercise of such power must not conflict with the Federal Constitution granting exclusive rights of regulation of interstate commerce to Congress, as will be seen later. As to power of state to control or impose burdens by license taxes or

vantage in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. It provides that "the said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with 20 per cent added thereto," and the manner of ascertaining the value by appraisers is provided. Said section has this further provision: "If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration thereof." Section 7 punishes any person or body corporate who interferes with the privileges granted to said company or exercises like acts or privileges, by a forfeit and fine to said company of $1,000 for every such offense, and makes each day's continuance of such offense a new offense. Section 8 exempts the company from the operation of §§ 6, 7, 13, 14, 15, 18, and 20 of art. 1 of "An Act Concerning Corporations," approved November 23, 1855. The sections of the act of November 23, 1855, here referred to, are contained in chap. 34, Rev. Stat. 1855, pp. 371–374. Section 9 is as follows: "This

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otherwise on such companies when doing an interstate business, see *note* to Postal Teleg. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161.

Another exercise of the police power in regulating the operation of electric lines is found in the statutes requiring telegraph and telephone companies to supply equal facilities to all who desire to use them, including other telegraph and telephone companies. Croswell, Electricity, chap. 14. These statutes are a valid exercise of the police power of the state. Atlantic & P. Teleg. Co. v. Western U. Teleg. Co. 4 Daly, 527; United States Teleg. Co. v. Western U. Teleg. Co. 56 Barb. 46; Smith v. Gold & S. Teleg. Co, 42 Hun, 454; Bradley v. Western U. Teleg. Co. 17 Fed. Rep. 834, note; Metropolitan Grain & S. Exchange v. Chicago Board of Trade, 15 Fed. Rep. 850; Shepard v. Gold & S. Teleg. Co. 38 Hun, 338; Western U. Teleg. Co. v. Call Pub. Co. 44 Neb. 326, 27 L. R. A. 622; Sterrett v. Philadelphia Local Teleg. Co. 18 W. N. C. 77; Davis v. Electric Reporting Co. 19 W. N. C. 567; Cain v. Western U. Teleg. Co. 18 Cin. W. L. Bull. 267; New York & C. Grain & S. Exchange v. Chicago Board of Trade, 127 Ill. 153, 2 L. R. A. 411; Marine Grain & S. Exchange v. Western U. Teleg. Co. 22 Fed. Rep. 23; Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co. 66 Md. 399, 59 Am. Rep. 167; State, American U. Teleg. Co., v. Bell Teleph. Co. 36 Ohio St. 296; Commercial U. Teleg. Co. v. New England Teleph. & Teleg. Co. 61 Vt. 241, 5 L. R. A. 161; State, Baltimore & O. Teleg. Co., Bell Teleph. Co. 23 Fed. Rep. 539; State, Postal Teleg. Cable Co. v. Delaware & Atlantic Teleph. & Teleg. Co. 47 Fed. Rep. 633, Affirmed *sub nom.* Delaware & A. Teleg. & Teleph. Co. v. State, Postal Teleg. Cable Co., 50 Fed. Rep. 677, 3 U. S. App. 30; Bell Teleph. Co. v. Pennsylvania, Baltimore & O. Teleg. Co., 7 East, 672; People, Postal Teleg. Cable Co., v. Hudson River Teleph. Co. 19 Abb. N. C. 466.

These statutes requiring telegraph and telephone companies to supply equal facilities have been questioned only in respect to telephone companies where a contract had been made to give the exclusive use of the telephone service for telegraphic use to a single company. In one case only such a contract was sustained, but in other cases it was held invalid as against the statute. As to these, see *note* to Com. v. Petty (Ky.) 29 L. R. A. 791.

Other forms of police regulation of the operation of electric lines are found in the statutes requiring telegrams to be kept in inviolate secrecy by the operators (Croswell, Electricity, § 436), and preventing outsiders from tapping the wires, or otherwise gaining information as to the contents of telegrams or hearing telephone messages (Id. § 439), and statutes exempting telegraph operators from jury duty. Id. §§ 440-442.

An instance of the application of police regulation to electric railways is found in the statute requiring screens or enclosures on the front of the car to protect the motorman in cold weather. Ohio Laws, 1893, p. 220, §§ 1, 2; Minn. Gen. Laws 1893, chap. 63, §§ 1-3.

These statutes have been held to be valid exercise of the police power. State v. Hoskins, 58 Minn. 35, 25 L. R. A. 759; State v. Smith (Minn.) 25 L. R. A. 759; State v. Nelson, 52 Ohio St. 88, 26 L. R. A. 317; State v. Nelson, 31 Ohio L. J. 220.

V. *Limitations of the police power.*

The police power has been previously shown to be an inherent power of the state to impose such regulations upon the use of property and the conduct of individuals as will promote the peace and safety of the community. As the people are the source of universal power in government, it results that there are no limitations to the exercise of the police power except such as have been voluntarily imposed by the people in the constitutions adopted by them in the several states, or in the Federal Constitution.

a. *Limitations in state Constitutions.*

Several provisions of the Constitutions have been alleged in various instances to conflict with the exercise of police regulation of electric lines in different forms of the exercise of this power.

1. *Impairment of obligation of contracts.*

It has been alleged in some cases that the provisions of a state Constitution which prohibit the passage by the legislature of any statute impairing the obligation of a contract, render unconstitutional laws which require electric lines to be placed under ground, because the franchise which the electric company has from the municipal authorities to erect its poles and string its wires in the streets is a contract. This contention has not been sustained. The police power of the state exercised for the safety and welfare of the inhabitants, overrides any contracts between individuals, or even contracts between corporations and the state, in the charter granted by the state to the electric companies, or the franchises granted to such companies, either directly by the state, or mediately through the municipal authorities. Moreover, statutes which require electric wires to be put underground do not impair any contract in the grant to the companies of the right to construct their lines in the streets, for the grant of the right to carry their lines through the streets was made originally subordinate to the convenience of public travel, and still remains in full force to this extent, and the exercise of it is merely regulated in such way as to insure the safety and comfort of the inhabitants. People, New York Electric Lines Co., v. Squire, 107 N. Y. 593; Monongahela v. Monongahela Electric Light Co. 12 Pa. Co. Ct. 523; Western U. Teleg. Co. v. New York, 38 Fed. Rep. 552, 3 L. R. A. 449, 2 Inters. Com. Rep. 533; American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454; United States Illum. Co. v. Hess, 19 N. Y. S. R. 883; United Lines Teleg. Co. v. Grant, 137 N. Y. 7.

act shall take effect from its passage, and shall continue in force for thirty years." The act of March 3, 1857 (Laws 1857, p. 599), is as follows:

"An Act Supplementary and Amendatory of an Act Entitled 'An Act to Incorporate the Laclede Gaslight Company.' Be it enacted by the general assembly of the state of Missouri as follows:

"Sec. 1. The act to which this act is amendatory is hereby amended as that the words 'sole and exclusive,' in the 5th section of the act are stricken out.

"Sec. 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the 6th section of the before-recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

"This act to take effect and be in force from and after its passage."

The act of March 26, 1868 (Laws 1868, p. 187), was entitled "An Act to Amend an Act to Incorporate the Laclede Gaslight Company, approved March 2, 1857," and is as follows:

"Sec. 1. The said Laclede Gaslight Company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the 5th

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2. *Deprivation of property without due process of law.*

In several cases it has been urged that the acts which require electric wires to be placed under ground deprive electric companies of a species of property, namely, the right under their franchises to construct their lines in the streets, and that this deprivation is without due process of law. This contention cannot be sustained even if the franchise rights are considered as a species of property, for such rights are subordinate to the convenience of travel, and the statutes are simply a regulation of the mode of enjoying this species of property in the manner most consistent with the safety and comfort of the public. Monongahela v. Monongahela Electric Light Co. 12 Pa. Co. Ct. 529; American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454; People, New York Electric Lines Co., v. Squire, 107 N. Y. 593; United States Illum. Co. v. Hess, 19 N. Y. S. R. 883; United Lines Teleg. Co. v. Grant, 137 N. Y. 7; Western U. Teleg. Co. v. New York, 38 Fed. Rep. 552, 3 L. R. A. 449, 2 Inters. Com. Rep. 533.

3. *Class legislation.*

In several instances statutes which require electric railways to put screens or boxes on the front of their motor cars to protect the motormen from the weather have been objected to as unconstitutional as being class legislation in states whose constitutions forbid such legislation. The claim has been that as such statutes apply to electric cars only, and not to horse cars or cars propelled by other animals, they are in effect class legislation, but the courts in all these cases sustained the statute, holding that it was not class legislation because it applied to all the railways of the kind to which it was intended to apply. State v. Hoskins, 53 Minn. 35, 25 L. R. A. 759; State v. Smith (Minn.) 25 L. R. A. 759; State v. Nelson, 52 Ohio St. 88, 26 L. R. A. 317; State v. Nelson, 31 Ohio L. J. 220.

b. *Limitations in Federal Constitution.*

A strong effort has been made in various cases involving the exercise of police powers of state governments in the regulation of electric companies, to invoke the aid of the Federal Constitution as prohibiting such regulation. The provisions of the Federal Constitution which have been relied upon to effect this prohibition have been: (1) Those which prohibit any state from depriving any person of property without due process of law (14th Amend. § 1); (2) which prohibit enactment by states of any law impairing the obligation of contracts (art. 1, § 10); (3) which restrict to the action of the Federal government any regulation of commerce among the several states (art. 1, § 8); and (4) which give jurisdiction of patents to the Federal courts. *Ibid.*

The police power of the states in its relation to the Federal Constitution, is often called one of the reserve powers of the states, under article 10 of the Federal Constitution, which provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306.

The question then arises, if this reserve police power which is in reality one of the attributes of sovereignty residing in the people of the state, and not delegated by it to the Federal government, comes in conflict in its practical application with any provision of the Federal Constitution, whether the state or the Federal power shall be held superior.

The Federal courts have with unanimity recognized the existence of the police power as one of the reserve powers of the states, and say that the police power extends at least to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights, and state legislation strictly and legitimately for police purposes does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided expressly or by implication to the national government. An instance of this is Patterson v. Kentucky, 97 U. S. 501, 504, 24 L. ed. 1115, 1116, sustaining state regulation and test of patented oil.

But nevertheless, state statutes enforcing police regulations may sometimes trench upon the Federal jurisdiction, and when their provisions extend beyond a just regulation of rights for the public good, and unreasonably abridge or burden the privileges which the national authority conserves, they cease to be operative. Western U. Teleg. Co. v. New York, 38 Fed. Rep. 552, 3 L. R. A. 449, 2 Inters. Com. Rep. 533.

The state, when providing by legislation for the protection of the public health, public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. In any case where a state statute enforcing police regulations is alleged to come in conflict with the Federal Constitution, the Federal courts will take jurisdiction of the case and inquire into the real purpose and objects of the statute in question, and if it is in its scope an interference with any of the powers delegated to the Federal government, the Federal courts will declare it so far forth unconstitutional and void. *Ibid.*

Taking up now the several instances in which conflicts between the Federal Constitution and the police power of the state have occurred, they may be grouped as follows:—

1. Statutes requiring electric wires to be put underground.

2. Statutes imposing penalties upon telegraph companies for not transmitting and delivering messages properly.

section of the act to which this act is amendatory, and may at any time lease, sell, or dispose of any portion of said rights, privileges, and franchises to individuals, associations, or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

"Sec. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

"Sec. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gaslight Company; and the 6th section of said act to which this act is amendatory, is hereby repealed.

"Sec. 4. An act entitled an act supplementary to and amendatory of an act entitled an act to incorporate the Laclede Gaslight Company, approved March 3, 1857, is hereby repealed.

"Sec. 5. This act shall take effect from its passage."

Relator represents further that under the charter rights granted by these general acts it is, and for a long time has been, engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of its public streets by electricity; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large

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3. Statutes regulating telephone prices and requiring service on equal terms to all.

4. Statutes imposing license fees on telegraph companies.

1. *Statutes requiring electric wires to be put underground.*

The chief point in which it is alleged that these statutes are in conflict with the Federal Constitution is in their application to telegraph lines. The telegraph occupies a peculiarly favored position under the Federal Constitution, as construed by the United States Supreme Court. That court has decided that the telegraph is a means or instrument of interstate commerce. Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

And Congress, having by its statutes given the telegraph a right of way over all post roads of the United States (U. S. Rev. Stat. §§ 5263 *et seq.*), no state can exclude it from its occupation of such roads with its line. See *note* to Kindel v. Beck & P. Litbographing Co. (Colo.) 24 L. R. A. 311.

Therefore when, under the provisions of the New York subway act, the state authorities ordered the telegraph lines underground, the telegraph companies immediately raised the objection that this act deprived them of their right of way over the post roads under the Federal Constitution. The court of appeals of New York state, however, held that the ordering the wires underground was merely a proper police regulation of the enjoyment by telegraph companies of their Federal rights, saying: "The precise scope and range of operation of these sections within a state are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the state, except under regulations prescribed for the control of all telegraph companies within the state, nor could such companies interfere with streets and highways in the state so as materially to impair their usefulness as ordinary highways. Nor could these congressional acts deprive the state of its control over its highways, and its right to regulate their use under the police power for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself, to place its electrical conductors in the subways constructed beneath the surface of the streets." American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454.

And the Federal courts take the same view. "Nevertheless persons and corporations enjoying grants and privileges from the United States, exercising Federal agencies, and engaged in interstate commerce, are not beyond the operation of the laws of the state in which they reside or carry on their business; and it is only when these laws incapacitate or unreasonably impede them in the exercise of their Federal privileges or duties, and transcend the powers which each state possesses over its purely domestic affairs, whether of police or internal commerce, that they invade the national jurisdiction. . . . The statutes which the defendants are proceeding to enforce unquestionably belong to the category of police regulations, the power to establish which has been left to the individual states. But statutes of this class may sometimes trench upon the Federal jurisdiction; and when their provisions extend beyond a just regulation of rights for the public good, and unreasonably abridge or burden the privileges which the national authority conserves, they cease to be operative. The state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205; Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 462, 464, 30 L. ed. 241, 242. . . . It is not apparent how the regulation proposed impairs in any just sense the privilege granted to the complainant [telegraph company] by the law of Congress. The privilege to maintain telegraph wires over and along post roads is not to be construed so literally as to exclude regulations by the state respecting location and mode of construction and maintenance, which the public interests demand; but it is to be construed so as to give effect to the meaning of Congress, which was to grant an easement that would afford telegraph companies all necessary facilities, and which to that extent should be beyond the reach of hostile legislation by the states. Thus interpreted, the grant is no more invaded when the regulation requires the wires to be placed in conduits underground than it would be if they were required to be placed in conduits along the surface of the streets; and when this becomes necessary for the comfort and safety of the community, such a regulation is as legitimate as one would be prescribing that the poles should be of a uniform or designated height, or should be located at different distances apart, or at designated places along the street." Western U. Teleg. Co. v. New York, 38 Fed. Rep. 552, 3 L. R. A. 449, 2 Inters. Com. Rep. 533. To the same effect, H. Clausen & Sons Brew. Co. v. Baltimore & O. Teleg. Co. 2 Am. Elec. Cas. 216.

But the right of a telegraph company to maintain its wires along the structure of an elevated railroad which constitutes an independent post road is sustained, although with some doubt, by Judge Wallace in the above case of Western U. Teleg. Co. v. New York. He says: "Inasmuch as the maintenance of the wires of the complainant upon the structures of the railway company is not

part of the inhabitants thereof; that in order to fulfil its obligations to the city and the public under its charter, it has erected and maintains expensive and costly plants for the manufacture and distribution of gas, as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained, and now maintains, a system of pipes laid underground along the streets of the city of St. Louis, as it was at all times authorized to do by its said charter, nor has the city of St. Louis ever objected to its so doing, or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wires, strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish light to private consumers as for the fulfillment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of disturbing electric currents,

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at present attended with any public inconvenience, and the question is one of sufficient novelty and importance to be considered by the court of last resort, any doubt should be resolved in favor of the complainant for the purpose of its temporary protection."

The underground statute has also been alleged to be in opposition to the Federal Constitution for two other reasons which were brought before the Federal courts on a petition of mandamus by a corporation in New York which previous to the subway act had obtained franchises to lay underground conduits for electric lines. The subway act required all underground lines to be approved by the commissioners of electrical subways. The conduit company, the relator in the petition for mandamus, alleged that the imposition of this precedent requiring the approval of the subway commissioners upon its franchise already granted, injured the company in two ways (1) that it was thereby deprived of its property without due process of law, in opposition to the 14th Amendment to the Federal Constitution, and (2) that the act impaired the obligation of a contract in opposition to § 10 of art. 1 of the Federal Constitution. The United States Supreme Court, however, did not sustain these claims, but held that the only effect of the statute was to regulate the manner of enjoying their rights. New York, New York Electric Lines Co., v. Squire, 145 U. S. 175, 36 L. ed. 666.

2. *Statutes imposing penalties upon telegraph companies for not transmitting and delivering messages properly.*

The statutes which have been enacted in many states imposing certain duties upon telegraph companies, such as transmitting messages with due care and dispatch, and delivering them promptly, and with due care, and in some instances without charge for delivery in limited districts, and imposing penalties upon the company for noncompliance, have been brought before the Federal and state courts in a number of cases, by telegraph companies, as being an interference by state legislation with interstate commerce, so far as they are applied to omissions or delinquencies occurring outside of the state enacting the statutes. The most important case upon this point is Western U. Teleg. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692. The supreme court of Indiana held that the state statute was valid because it did no more than require the telegraph company to perform under a penalty the duties imposed upon it by the common law, and this case was followed in the same state by others decided on the same ground. On appeal to the Supreme Court of the United States, however, that court held that such a statute could have no effect, so far as regulating the actions of the telegraph company outside of the state of Indiana was concerned, for if it did it would become a regulation of interstate commerce. Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306.

But several state courts distinguishing the Pendleton Case have held that a statutory penalty for delay in delivering a message within the state, although it may have been sent from another state, is not an interference with interstate commerce. Western U. Teleg. Co. v. Tyler, 90 Va. 297, 4 Inters. Com. Rep. 481; Western U. Teleg. Co. v. Bright, 90 Va. 778; Western U. Teleg. Co. v. James, 90 Ga. 254; Western U. Teleg. Co. v. Bates, 93 Ga. 352.

On the other hand, an Indiana statute providing penalties for default or mistake in transmission of messages was construed to be inapplicable to messages sent into the state from other states, on the ground that the contracts were made outside of the state. Rogers v. Western U. Teleg. Co. 122 Ind. 395; Western U. Teleg. Co. v. Reed, 96 Ind. 195; Carnahan v. Western U. Teleg. Co. 89 Ind. 526, 46 Am. Rep. 175.

That telegraph messages between points in the same state do not constitute interstate commerce because of the fact that they traverse another state on the route is decided in State, Railroad Commission, v. Western U. Teleg. Co. 113 N. C. 213, 22 L. R. A. 570, sustaining the power of railroad commissioners to make rates for telegraph lines.

An Indiana statute allowing special damages for negligence of a telegraph company was sustained in Western U. Teleg. Co. v. Fenton, 52 Ind. 1, although the message was sent from another state. A question is suggested whether such special damages are a part of the remedy merely within the proper sphere of state regulation, although the transaction constitutes interstate business.

A state statute requiring a telegraph company to furnish sufficient facilities to do business both for individuals and other telegraph lines, and to do it promptly and impartially, is held valid in Connell v. Western U. Teleg. Co. 108 Mo. 459, deciding that this does not interfere with interstate commerce, but the case also holds that such a statute does not apply to a delivery of a message in another state.

The fact that a telephone line extends into another state and belongs to a foreign corporation is held not to exempt it from state control in respect to service and rates for persons within the state. Central U. Teleph. Co. v. State, Falley, 118 Ind. 194. To the same effect were Central U. Teleph. Co. v. Bradbury, 106 Ind. 1, and Hockett v. State, 105 Ind. 250, 55 Am. Rep. 201, but those cases did not discuss the interstate character of the business.

3. *Statutes regulating telephone prices and requiring service on equal terms to all.*

Attempts have been made by telephone companies to sustain the position that state statutes fixing maximum telephone rates and requiring the company to give equal service to all on equal terms are opposed to the right granted the Federal government by the Constitution to protect the rights

and in order to provide more effective and proper service, relator has made arrangements to lay its wires underground along and under the streets of said city, according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible. Relator states further that respondent was street commissioner of said city, and under its charter and ordinances had supervision and control of its streets, and the enforcement of ordinances relating thereto; that, after notice to said commissioner of its intention to do so, on the 30th day of October, 1894, the relator commenced excavating on said streets for the purpose of laying its electric wires underground, but was prevented from so doing by respondent, acting in his capacity as street commissioner; that thereupon relator applied to respondent for a permit to make such excavation for such purposes, which was denied it. Respondent made return to said writ, and by affirmative averments put in issue the rights claimed by relator, and set up the provisions of certain city ordinances regulating the use of electric wires on the streets of the city, and averred a noncompliance with the requirements of such ordinances. By demurrer to parts of the return, and motion to strike out other parts, the following issues of law were fairly framed: First. Is the act of March 26, 1868, unconstitutional, as being in conflict with § 2, art. 8, of the Constitution of Missouri of 1865? Second. Is said act void as being in conflict with § 25, of art. 4 of said Constitution? Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2, 1857? Fourth. Do the powers granted relator include the right to manufacture, sell, or distribute electricity for lighting purposes? Fifth. Has relator the right, under its charter, to place its wires underground, without the assent of the municipal authorities, and without compliance with the requirements of the valid ordinances of the city?

1. The object to be accomplished by the writ is to require Murphy, as street commissioner of the city of St. Louis, to issue to relator a permit to make such excavations on one of the public streets of the city, as may be necessary for the purpose of laying its electric wires underground. The constitutionality of the acts under which relator claims corporate existence is put in issue by the answer of respondent, and demurrer thereto. Respondent also charges that, though the acts of incorporation were valid, in the first instance, the life of the corporation itself has expired by limitation of its existence as fixed by the charter and general laws of the state. The city is not made a party to this proceeding, and we do not deem it necessary in this case to pass upon any questions that do not directly concern the duties of the street commissioner. We will not, therefore, consider, or express an opinion upon, any question involving the right of relator to exercise the rights or enjoy the franchises which appear to have been granted under the acts of the general assembly mentioned in the statement.

For the purpose of discussing the other questions involved, we will then assume, without deciding or intimating an opinion, that relator is an existing corporation possessing all the powers, rights, and privileges its charter purports to confer upon it. It is insisted by relator that under its charter it acquired from the state a vested right to the use of the streets of the city of St. Louis under which to lay its pipes for the transmission of gas or any other "substance or material" that might thereafter be adopted for illuminating purposes, and that such right was beyond the control of the municipal authorities; that electricity is a substance and material within the meaning of the charter, and therefore it has a vested right to lay its wires beneath the surface of the streets for the purpose of conducting electricity through the city for illuminating purposes, and that this right cannot be interfered with unreasonably by the city. With the views we take of this question, we do not think it necessary to inquire whether the right to use electricity for making light was included under the terms "substance or material" as used in the charter. It appears that relator has for a number of years, under contracts with the city, been lighting its streets by electricity, con-

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of inventors by the issue of patents. Const. art. 1, § 8. But this claim has been negatived by the state and Federal courts alike, for the reason that such statutes are merely proper police regulations of the manner in which the company owning the property protected by the monopoly granted by the United States shall enjoy such property in the locality in which it engages in business. On this point see full review of the cases in note to Com. v. Petty (Ky.) 29 L. R. A. 791.

4. *Statutes imposing license fees on telegraph companies.*

In many cases the state legislatures have imposed license fees either directly or by delegation through municipal authorities, upon telegraph and other companies for the privilege of occupying the streets with their poles and wires. The power to impose this fee is upheld when the fee is a reasonable payment either for the space occupied by the poles or for the inspection and care which the city gives them. St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 149 U. S. 465, 37 L. ed. 810, 39 Fed. Rep. 59; Postal Teleg. Cable Co. v. Baltimore, 156 U. S. 210, 39 L. ed. 399, Aff'g 24 L. R. A. 161; Allentown v. Western U. Teleg. Co. 148 Pa. 117; Chester v. Philadelphia, R. & P. Teleg. Co. Id. 120; Western U. Teleg. Co. v. Philadelphia (Pa.) 12 Atl. 144; Philadelphia v. Postal Teleg. Cable Co. 67 Hun, 21; Philadelphia v. Western U. Teleg. Co. 40 Fed. Rep. 615, 2 Inters. Com. Rep. 728; Philadelphia v. American U. Teleg. Co. 167 Pa. 406; New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 41; Croswell, Electricity, §§ 830-833; Harrisburg v. Pennsylvania Teleph. Co. 3 Pa. Dist. R. 815, 15 Pa. Co. Ct. 518; Bethlehem v. Pennsylvania Teleph. Co. 12 Lanc. L. Rev. 204; St. Louis v. Western U. Teleg. Co. 63 Fed. Rep. 68.

The case last cited holds that $5 per pole per annum is unreasonable when greatly disproportionate to the cost of the poles and wires and to the value of the adjoining property. For further particulars of these cases, see *note* to Postal Teleg. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161, which includes also cases as to licenses for doing business, and other forms of taxation as burdens on interstate telegraph and telephone companies. As to exclusion of foreign telegraph and telephone companies from state, see *note* to Kindel v. Beck & P. Lithographing Co. (Colo.) 24 L. R. A. 311. S. G. C.

ducted by wires strung above the surface of the streets, and other questions besides the abstract right to do so would be involved in such inquiry. We will therefore confine our inquiry to the question whether relator has a vested right to place its electric wires under the surface of the streets, without the assent of the municipal authorities thereof, and without compliance with valid ordinances of the city. Generally speaking, it is true, the legislature has supreme control of the streets of cities. It is also true that it may, and generally does, delegate to municipal corporations such measure thereof as it deems best. The control thus delegated may be exercised by the municipal authorities. Subsequent to the act of 1868, under authority of the Constitution of 1875, the city of St. Louis adopted a charter whereby the state delegated to it the power to regulate the use of its streets, and the power to pass all ordinances not inconsistent with the provisions of the charter or the laws of the state as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures. In pursuance of these powers the city enacted certain ordinances regulating and restricting the use of electric wires in the city, and requiring the assent of the board of public improvement in respect to the manner in which electric wires, tubes, and cables should be secured or supported and insulated. It is charged in the return and admitted by the demurrer that the relator had never complied with the requirements of this ordinance. Relator insists that the provisions of the ordinance cannot apply to rights secured to it by the state long prior to the date of the charter. It is the well-settled present policy of the law of this state to delegate to municipal corporations not only general police powers, but the control of their streets in respect to the use thereof for public purposes other than that of ordinary travel by pedestrians and private vehicles. Thus the Constitution prohibits the legislature from granting the right to construct and operate street railways within any town or village without first acquiring the consent of the local authorities having control of the streets. Mo. Const. § 20, art. 12. Again, the statute requires telegraph and telephone companies to obtain the consent of the city, through its municipal authorities, before they can exercise the right to lay their wires and other fixtures underground in any of its streets. Rev. Stat. 1889, § 2721. Electric wires, when charged, are recognized as being dangerous to life and property, and their use is therefore subject to police regulations. *Western U. Teleg. Co.* v. *Philadelphia* (Pa.) 21 Am & Eng. Corp. Cas. 40, and note; Dill. Mun. Corp. § 698. The state cannot limit its exercise of the police power by contract or in any other way. It was said by Chief Justice Waite: "All agree that the legislature cannot bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state, but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.'" *Stone* v. *Mississippi*, 101 U. S. 817, 25 L. ed. 1079. See *Boyd* v. *Alabama*, 94 U. S. 645, 24 L. ed. 302; *Metropolitan Bd. of Excise* v. *Barrie*, 34 N. Y. 657; *Lake Roland Elev. R. Co.* v. *Baltimore*, 77 Md. 381, 20 L. R. A. 126. Dillon says: "The citizen owns his property absolutely, it is true. It cannot be taken from him for any private use whatever, without his consent; nor can it be taken for any public use without compensation. Still he owns it subject to this restriction, namely: that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally." Dill. Mun. Corp. 4th ed. p. 12, § 141. The grant by the state to relator, though construed to include the right to use electricity for illuminating purposes in respect to such right, was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis. Under its general police power, the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.

2. But this is not the only reason why the city should, under its special power to regulate the use of its streets, and under its general police power, have the right to supervise and regulate the manner in which the electric wires of relator and all others should be placed and used in the public streets. The art of producing light by electricity was wholly unknown to science at the time the franchise was granted to relator. The legislature, having no knowledge of the use that would be made of streets in applying new discoveries in producing light, could not have intended to grant rights and powers inconsistent with their ordinary use. It would be most unwarrantable to imply, not only that relator had the right, under the general words used in the act of incorporation, to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights of the public to the use of the streets. The power delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it; and the art should be exercised, if at all, under the powers thus in force when it was brought into use. The following declaration of law was quoted approvingly in *Carroll* v. *Campbell*, 108 Mo. 559: "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." *Fanning* v. *Gregoire*, 57 U. S. 16 How. 534, 14 L. ed. 1047. There seem to me much stronger reasons for applying this rule to the manner in which a right conferred shall be exercised when more than one method is open, and when the rights and safety of the public are more or less affected by either. In such case where the public streets of a city, which are under municipal control, are to be used, it seems too plain for argument that the city should have the

right to direct the manner in which the use should be exercised. Again, it is a matter of common knowledge that electricity is used for the purposes of transmitting sound by telephone, for transmitting messages by telegraph, for generating light, and for producing power. These uses are regarded as public, and have become necessary to the business and convenience of the country, and particularly that transacted in large cities. Overhead electric wires in some streets are numerous. These contribute very materially to public convenience and private business, but, when not properly supervised and regulated, endanger the lives and property of the public. If used, as they generally are, in the public streets, public safety requires that they should be under police regulation and municipal control. It is a matter also of public notoriety that the question is now being considered whether it would not be necessary, in the interest of public safety, as well as convenience, that these wires should be placed underground, so as thereby to leave the streets safe and unobstructed. As a police regulation we have no doubt the municipal authorities would have a right to require this to be done in case no vested rights were infringed. Many corporations and companies doubtless now use electric wires for the various purposes above mentioned. It cannot be said, not having the various charters before us, that one of these possesses rights superior to those of any others. To accommodate them all, to prevent monopolies, and to regulate the use of the streets, it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wires shall be placed underground. Without such regulation, relator, or any other corporation using electric wires, could place them underground in such a manner as to practically exclude all others. Moreover, relator, as one of its important franchises, asserts the power to sell, lease, or dispose of any portion of said rights, privileges, and franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits named. Thus, under its charter, allowing the rights herein claimed, it could practically control the use of the streets in respect to laying electric wires underground, and exclude the city from one of the most important of its municipal powers. The legislature could never have contemplated such a result. By giving the city the right to regulate the laying of electric wires underground, relator is deprived of no vested right. If its charter gives it the right to use electricity for lighting purposes, it can do so, as we understand from the petition it has been doing, in the method now in use in said city. If the city should determine that public safety requires these wires to be placed underground, and provides the manner in which it shall be done, and relator believes its rights are thereby infringed, it will then be time enough to complain. As the case is now presented, we must hold that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either wholly prohibit relator from laying its wires under the streets, or which regulate the manner in which it may be done. Respondent, under his official duties as street commissioner, properly refused to grant the permit demanded, unless relator first complied with the requirements of the valid ordinances then in force.

Peremptory writ denied.

All the Judges concur; **Barclay, J., in the result.**

Hermann NOWACK, *Respt.*,
v.
William BERGER, Exr., etc., of Eberhard H. Schweer, Deceased, *et al.*, *Appts.*

(.....Mo.....)

1. **Children cannot be deprived of their rights** in property given them by will by the fact that a contract by the testator to give property to their father, which was not carried out, is enforced against the estate.
2. **A party to a contract with a deceased person** as well as to a cause of action against his estate, is incompetent to testify in the case.
3. **An oral contract for the adoption of a child** as an heir may be recognized and enforced after performance of the consideration.
4. **The surrender of a child by his mother to the custody and control of a man** whom she marries in pursuance of an oral contract by which, in consideration of the marriage and of the services of the child, the husband agrees to give the child a share of his estate equal to that which an heir would inherit, constitutes an independent, additional, and valuable consideration which will amount to part performance of the contract and take the case out of the operation of Rev. Stat. 1889, § 5186, prohibiting an action on a contract in consideration of marriage unless it is in writing.
5. **Marriage constitutes such part performance** by a woman of a contract in consideration of marriage as to prevent the operation of the statute of frauds in respect to the contract.
6. **The share which a person is entitled to from an estate** of a person who had agreed to give the former a specified share thereof cannot be diminished because of a gift by will of a portion of the estate to the children of the distributee.

(March 3, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Gasconade County in favor of complainant in a proceeding to enforce an agreement by Eberhard H. Schweer, deceased, to leave property to plaintiff. *Modified.*

Statement by **Sherwood, J.:**

In this proceeding for specific performance, it is conceded by plaintiff: That the abstract of pleading prepared by defendants is correct, which sets forth: "(1) That he, the said Eberhard H. Schweer, should take, adopt, support,

NOTE.—The validity of contracts to give money or property after the death of the promisor is the subject of annotation to Krell v. Codman (Mass.) 14 L. R. A. 860.

See also 33 L. R. A. 369; 43 L. R. A. 427.

and treat her son, this petitioner, at all times as his own natural child, and that plaintiff should at all times perform the duties towards said Schweer due from children towards parents. (2) That in case there should be no children born under his marriage with the said Augusta, that then the plaintiff should be sole heir to all the estate said Eberhard H. Schweer should have at his death, subject to the statutory legal rights of plaintiff's mother as widow; and that in case there should be children born of said marriage, that then plaintiff, upon the death of said Schweer, should receive and be given a share in the estate equal to what one of said Eberhard H. Schweer's own natural children would receive in case he were to die intestate; and that said Schweer should, during his lifetime, by last will or other means of conveyance, make disposition of his property accordingly." That, pursuant to said terms, said Augusta and said Schweer were married, on the 10th day of August, 1864. That said Schweer thereupon assumed control of plaintiff. That said Schweer required of plaintiff such services, and that plaintiff rendered to Schweer such services, as are due from a child to a parent. That plaintiff continued to live with Schweer until he approached his majority, when he was by Schweer induced to marry, and to move onto a tract of land described in the petition, being the same tract on which plaintiff now lives. That the marriage between the said Schweer and plaintiff's mother was dissolved by the death of Schweer, on the —— day of February, 1892. That there were born of said marriage three children, defendants Henry E., Fred W., and Ferdinand Schweer. That the said Schweer did not in his lifetime make any provision for plaintiff in accordance with the alleged contract. That, on the contrary, he left a last will and testament, whereby he devised and bequeathed to each of his three sons certain real estate and personal property, and to his widow, defendant Augusta Schweer, such of his estate as she would have been entitled to in case he had died intestate, and to plaintiff's children, defendants Annie A., Henry E., Matilda, and Tina Nowack, the said real estate on which plaintiff now lives, and gave nothing to plaintiff. That said will was probated and letters testamentary issued to the defendant William Berger, now in charge of the estate as executor. That the personal property left by said deceased was worth $13,635.11, and the real estate at least $27,000. Specific performance of this contract was asked by plaintiff. The second count states substantially the same facts as the first count, except that the alleged contract between E. H. Schweer and Augusta Nowack is stated in somewhat different terms, as follows: That the plaintiff should be legally adopted by the said Schweer, and should perform all the duties and services towards said Schweer due from children towards parents; and that, upon the death of said Eberhard Schweer, if no children should be born of the marriage between the said Schweer and the said Augusta, plaintiff should inherit all the property which said Schweer might leave; and that, if there should be children born of the marriage, then plaintiff should have equal share with each of said children. And, except that, the second count states that, when plaintiff approached the age of majority, said E. H. Schweer, induced him to marry one Caroline Bartlett, upon a promise to give to plaintiff the farm on which plaintiff now lives, and renewed his promise that at his death he would give plaintiff sufficient to make him equal with his own sons; that, in reliance upon these promises, plaintiff married, on the 15th day of September, 1882 (before he had fully arrived of age), and went into possession of said real estate, and made lasting and valuable improvements thereon, by clearing land, erecting buildings, and planting an orchard, and continued to cultivate the same to the commencement of this suit; that, instead of giving plaintiff the said farm, said Schweer, by said last will, gave it to plaintiff's minor children, the defendants Annie, Henry, Matilda, and Tina Nowack, etc. With the exception of the minor defendants, who answered by their guardian, in usual way, the adult defendants answered as follows: "(1) A general denial of all the allegations of the petition. (2) That the contract alleged in both counts of the petition, and all matters alleged touching and concerning the same, was and is, and this action is brought to charge defendants upon, an agreement in consideration of marriage; and no such agreement, nor any note or memorandum thereof, was or is in writing, signed by the said E. H. Schweer, or by any other person by him thereto lawfully authorized."

Messrs. **Kiskaddon & Meyer** and **John W. Booth,** for appellants:

The alleged contracts of Eberhard Schweer, on which respondent's suit is founded, are mere oral agreements, made in consideration of marriage. They are therefore void under the statute of frauds.

Mo. Rev. Stat. 1889, §§ 5186, 6853, 6854.

Neither of the subsequent marriages was such a part performance as would take the case out of the statute. Each contract as proved is an entirety, and, marriage being the sole consideration moving Schweer to make such, then no acts of the said Schweer, or any other person, subsequent to the marriage, can be considered a part performance.

Finch v. *Finch*, 10 Ohio St. 501; *Henry* v. *Henry*, 27 Ohio St. 121; *Caton* v. *Caton*, L. R. 1 Ch. 137; *Montacute* v. *Maxwell*, 1 P. Wms. 618; *McAnnulty* v. *McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552; *Flenner* v. *Flenner*, 29 Ind. 564; *Wood* v. *Savage*, 2 Dougl. (Mich.) 316; *Brown* v. *Conger*, 8 Hun, 625.

The acts claimed to be a part performance must be of such a character that they show, (1) (without proof of the terms of the contract) that there must be a contract of some kind between the parties; and (2) (when the terms of the alleged contract are proved) that the acts are solely referable to that contract and no other, and would not have been done had it not been for that contract.

Paris v. *Haley*, 61 Mo. 453; *Phillips* v. *Thompson*, 1 Johns. Ch. 131; *Rogers* v. *Wolfe*, 104 Mo. 1; *Charpiot* v. *Sigerson*, 25 Mo. 63; *Sitton* v. *Shipp*, 65 Mo. 297; Browne, Stat. Fr. 4th ed. §§ 454 *et seq.*; *Williams* v. *Morris*, 95 U. S. 444, 24 L. ed. 360; Agnew, Stat. Fr. 471; *Dung* v. *Parker*, 52 N. Y. 494; *Emmel* v. *Hayes*, 102 Mo. 186, 11 L. R. A. 323.

Where a stepfather assumes the status of a parent toward a stepchild, the presumption is that they hold toward each other the relation of parent and child. Services rendered for each other cannot be referred to a contractual relation between them. No such relation will be presumed to exist, but the contrary.

Schouler, Dom. Rel. 4th ed. § 273; *Gillett* v. *Camp*, 27 Mo. 541.

The terms of the alleged contract and the alleged acts of part performance must be clearly and definitely proved. Nothing can be left to mere inference. If an inference is allowable at all, it must be a necessary and inevitable inference, drawn from facts clearly and definitely proved.

Veth v. *Gierth*, 92 Mo. 97; *Taylor* v. *Williams*, 45 Mo. 80; *Paris* v. *Haley*, 61 Mo. 453, *Tedford* v. *Trimble*, 87 Mo. 226; *Wendover* v. *Baker*, 121 Mo. 273.

And the contract must be established in all its terms beyond a reasonable doubt.

Johnson v. *Quarles*, 46 Mo. 423; *Berry* v. *Hartzell*, 91 Mo. 132.

There is no mutuality in the contract proved.

Glass v. *Rowe*, 103 Mo. 513; Waterman, Spec. Perf. § 199.

The alleged acceptance by plaintiff of the farm given to him by his stepfather in alleged consideration of his marriage with Bartlett's daughter and without anything indicating that this farm was to be a part of the property to which plaintiff would be entitled, is inconsistent with the plaintiff's contention that he was to have an equal share with Schweer's children in all of Schweer's property, and is a waiver of the alleged earlier contract.

Tolson v. *Tolson*, 10 Mo. 736; Fry, Spec. Perf. 3d Am. ed. §§ 1003, 1008, 1015, 1017.

The minor defendants ought not to be deprived of their land.

Emmel v. *Hayes*, 102 Mo. 186, 11 L. R. A. 323; *Taylor* v. *Von Schraeder*, 107 Mo. 206; *Johnson* v. *Hurley*, 115 Mo. 513; Browne, Stat. Fr. pp. 480, 488, 490.

The contract must not only be proved in a general way but its terms must be so precise and exact that neither party could reasonably misunderstand them.

Wendover v. *Baker*, 121 Mo. 273; 2 Beach, Eq. Jur. § 584.

Mr. **Robert Walker,** for respondent:

A stepfather is not entitled to the services and earnings of a stepchild, nor under any obligations to support it. From the duty of a parent to provide for and support a child results the corresponding right of the parent to the earnings and services of the child.

Schouler, Dom. Rel. 3d ed. §§ 243, 273; 2 Kent, Com. pp. 193, 218; *Worcester* v. *Marchant*, 14 Pick. 510.

An agreement to make a will in a particular way is valid if supported by sufficient consideration, and although oral, if partly performed is enforceable.

Wright v. *Tinsley*, 30 Mo. 389; *Gupton* v. *Gupton*, 47 Mo. 37; *Sutton* v. *Hayden*, 62 Mo. 101; *Sharkey* v. *McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *Fuchs* v. *Fuchs*, 48 Mo. App. 18.

A contract for the adoption of a child and leaving all of one's property upon such person's death to such child is a valid contract, and upon performance of the duties as an adopted child by such a child, such contract or agreement, although oral, is taken out of the statute of frauds and will be specifically enforced.

Sharkey v. *McDermott*, *supra*; *Healey* v. *Simpson*, 113 Mo. 340; *Teats* v. *Flanders*, 118 Mo. 669.

The agreement sued upon and proved in this cause was one not only in consideration of marriage, but also that Schweer should adopt the plaintiff and take the latter as his own child, and should upon his death leave his property to the plaintiff. Such contract, if in writing, would be a valid contract; and such contract after being completely performed on the part of the plaintiff's mother and plaintiff, and after Schweer had all the advantages from such performance, is not within the statute and will be specifically enforced.

Van Dyne v. *Vreeland*, 11 N. J. Eq. 370, 12 N. J. Eq. 142; *Davison* v. *Davison*, 13 N. J. Eq. 246.

The agreement in this cause was based upon most meritorious and valuable consideration.

1 Throop, Validity of Verbal Agreements, § 719; *Miller* v. *Goodwin*, 8 Gray, 542; *Crane* v. *Gough*, 4 Md. 316; 1 Parsons, Contr. 5th ed. p. 431.

The statute of marriage contracts pleaded by appellants has only application to existing estates, and does not apply to transactions like the case at bar.

Mo. Rev. Stat. 1889, § 6853.

When a marriage has been contracted upon faith of a verbal promise equity should not then suffer the statute to be interposed as a shield in defeating the performance of such promise relied upon.

1 Throop, Validity of Verbal Agreements, § 720; *Durham* v. *Taylor*, 29 Ga. 166; *Jenkins* v. *Eldredge*, 3 Story, 181.

If outside of marriage there is an additional consideration, performance of which would of itself entitle a party to relief, the statute cannot then be interposed as a shield and defense.

1 Throop, Validity of Verbal Agreements, §§ 708, 718; Agnew, Stat. Fr. p. 124; *Dygert* v. *Remerschnider*, 32 N. Y. 629; *Crane* v. *Gough*, *supra*; *Satterthwaite* v. *Emley*, 4 N. J. Eq. 489, 43 Am. Dec. 618; *Riley* v. *Riley*, 25 Conn. 154; *Warden* v. *Jones*, 23 Beav. 494; *Bradley* v. *Saddler*, 54 Ga. 681; *De Biel* v. *Thomson*, 3 Beav. 469; *Maxwell* v. *Lady Montacute*, Prec. in Ch. 526.

The contract sought to be enforced herein is definite and certain, and the terms are satisfactorily proved.

Vanduyne v. *Vreeland*, 12 N. J. Eq. 142; *Sutton* v. *Hayden*, 62 Mo. 101.

A contract should be supported rather than defeated.

2 Parsons, Contr. 5th ed. p. 503.

Plaintiff (outside of the farm on which he resided) had no right to ask any property from Schweer until after the latter's death. Prior to that time he could not by mere application waive any rights which did not accrue until after then.

Huffman v. *Hummer*, 18 N. J. Eq. 83; *Traboe* v. *North*, 2 A. K. Marsh. 361; *Melton* v. *Smith*, 65 Mo. 315.

Plaintiff would also be entitled to the farm

on which he lives by virtue of the gift and advancement thereof made to him upon his marriage by Schweer, and by virtue of taking possession thereupon of said farm and making lasting improvements.

Browne, Stat. Fr. 3d ed. § 216; *Dugan* v. *Gittings*, 3 Gill. 138, 43 Am. Dec. 306; *Wright* v. *Tinsley*, 30 Mo. 398; *West* v. *Bundy*, 78 Mo. 407; *Anderson* v. *Shockley*, 82 Mo. 250.

Sherwood, J., delivered the opinion of the court:

1. The testimony of Frederick and Henrietta Kotwitz (at whose house Augusta Nowack was then living, with the illegitimate son, the plaintiff, then some two years old) abundantly sustains the allegations of the petition as to the nature, terms, and scope of the agreement entered into between Eberhard H. Schweer, deceased, and said Augusta. There was no evidence to the contrary, and the lower court, after findings suitable to the occasion, decreed that "a child's share, or the one fourth part of all the estate and property of the said Eberhard H. Schweer, be decreed to plaintiff, subject to the right of dower of the widow, the defendant Augusta Schweer, in all the real and personal estate; that all the estate and property left by the said Schweer at his death is hereby declared in trust to be distributed as follows: That plaintiff receive the one-fourth part thereof, subject to the right of dower of the widow aforesaid; and that this one-fourth part comprise the said land on which he now resides, and which by the last will of said Schweer was given to plaintiff's children, and the balance of all property and estate be divided as directed in the last will of said Schweer; and that, for the purpose of dividing said property, contribution is hereby ordered of the defendants Henry P. Schweer, Fred W. Schweer, and Ferdinand Schweer, in proportion to the value and amount of property respectively given to each of them in said will; and that the executor of said Eberhard H. Schweer be adjudged to pay the costs incurred in this suit out of the estate of said Eberhard H. Schweer."

Inasmuch as the circuit court did not find plaintiff entitled to specific performance of the additional contract made with plaintiff as alleged in the second count in this petition, and did not decree performance thereof, and inasmuch as he is content with, and does not appeal from, the decree, it is unnecessary to consider the correctness of the ruling which omitted to specifically perform such additional contract. But while this is true, and while plaintiff is in no position to complain, yet it is otherwise as to the minor defendants, his children. To them the will of Schweer gave the farm on which plaintiff resided, and on which he had thus lived for some ten years at the time of Schweer's death. The contract made between plaintiff's mother and Schweer only entitled plaintiff to one fourth of whatever property, real or personal, Schweer had at the time of his death. Under such a contract, however, he was not entitled to have his share assigned in any particular portion of the property thus left. But his minor heirs were entitled to just what was devised to them by Schweer, estimated to be worth not over $1,200. Of this right, derived from the will of Schweer, they could not lawfully be deprived, even if the deposition of Frederick Kotwitz, taken before they were made parties to the proceeding, and which tended to prove the original contract, could have been received against them. That portion of the decree which sought to deprive these minors of their rights under the will, or, rather, which ignored those rights altogether, is therefore erroneous, and cannot be permitted to stand. As we understand the decree, although it is not entirely unambiguous, it provides substantially for the specific performance of the contract mentioned in the first count in plaintiff's petition; and in so far as it does this it is correct, and incorrect only to the extent already stated. If the points to be presently passed upon are ruled in plaintiff's favor, a decree, however, can be entered in this court which will put matters in proper shape in reference to the rights of all concerned.

2. The ruling was proper which denied the admissibility of Augusta Nowack as a witness. She was a party to the contract, as well as to the cause of action, and, by reason of this, was incompetent. *Wendover* v. *Baker*, 121 Mo. 273, and cases cited; *Lins* v. *Lenhardt*, 127 Mo. 271; *Chapman* v. *Dougherty*, 87 Mo. 617, 56 Am. Rep. 469; *Meier* v. *Thieman*, 90 Mo. 433; *Berry* v. *Hartzell*, 91 Mo. 132; *Leach* v. *McFadden*, 110 Mo. 584; *Messimer* v. *McCray*, 113 Mo. 382.

3. Such contracts as the one here in litigation, in so far as they relate to the adoption of a child and making him an heir, etc., have often been recognized and enforced in this state and elsewhere. *Sutton* v. *Hayden*, 62 Mo. 101; *Wright* v. *Tinsley*, 30 Mo. 389; *Gupton* v. *Gupton*, 47 Mo. 37; *Sharkey* v. *McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *West* v. *Bundy*, 78 Mo. 407; *Anderson* v. *Shockley*, 82 Mo. 250; *Leach* v. *McFadden*, 110 Mo. 584; *Healey* v. *Simpson*, 113 Mo. 340; *Teats* v. *Flanders*, 118 Mo. 669.

4. It thus comes to be considered whether the contract now under consideration, owing to the peculiar circumstances attendant on its making, will prevent that feature of it mentioned in the next preceding paragraph from being specifically performed. It is urged here, as in the court below, that the contract between Augusta Nowack and Eberhard H. Schweer, being made "in consideration of marriage," and not being in writing, is void by reason of the provisions of § 5186, Rev. Stat. 1889; but this is an erroneous view of that section, because it does not make a contract in consideration of marriage void, but merely prohibits any action from being brought thereon, unless such contract "shall be in writing," etc. 1 Bishop, Married Women, § 807. There have been in England and in this country many decisions on the statute in question, involving the point now in litigation; but it seems to be settled by the weight of authority that, though a parol antenuptial contract is invalid when made solely in consideration of marriage, yet that such contract can stand if, in addition to the marital portion thereof, it has another feature, the performance of which may be reckoned part performance, and thus prevent defeat of the antenuptial agreement, because of not being in

writing, provided there was reliance on the promise which is made the basis for specific relief. *Taylor* v. *Beech*, 1 Ves. Sr. 297; *Ungley* v. *Ungley*, L. R. 4 Ch. Div. 73; Browne, Stat. Fr. 5th ed. §§ 217, 459*a*, and cases cited; Fry, Spec. Perf. § 595; 2 Parsons, Contr. 7th ed. 77, and cases cited; Agnew, Stat. Fr. 124; *Dygert* v. *Remerschnider*, 32 N. Y. 629; *Riley* v. *Riley*, 25 Conn. 154; 1 Bishop, Married Women, § 807; Throop, Validity of Verbal Agreements, § 708. Here Schweer, upon marriage to Augusta Nowack, would not have been entitled to the custody, service, and earnings of plaintiff, but for the latter being surrendered to Schweer by his mother, in furtherance of the parol agreement to that effect. Schouler, Dom. Rel. 5th ed. § 273. This agreement being proved as aforesaid, and it having been also complied with, as shown by the testimony on the part of plaintiff, supplies such independent, additional, and valuable consideration as will, under the authorities cited, amount to part performance, and take this case out of the purview and operation of the statute of frauds. Although there is testimony that plaintiff, while about seventeen years old, on one occasion struck his stepfather with a stove-lid lifter on the head, yet great provocation is shown for this, in that Schweer had called plaintiff's mother a "prostitute." Evidently, Schweer did not regard plaintiff a very undutiful or bad boy, or else his conduct some three years thereafter, in promoting the marriage of plaintiff with Bartlett's daughter, was very reprehensible conduct.

5. But the agreement between the parties may be looked at from an entirely different point of view. On all hands it stands confessed that marriage is a valuable consideration. Lord Coke says: "If a man had given land to a man with his daughter in frank marriage generally, a fee simple had passed without this word 'heirs;' for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posterity." Co. Litt. 9*b*. Elsewhere it is said: "Marriage is the highest consideration known in law." *Johnston* v. *Dilliard*, 1 Bay, 232. See also 4 Kent, Com. 464; 1 Bishop, Married Women, §§ 27, 775; *Ford* v. *Stuart*, 15 Beav. 499; *Greene* v. *Cramer*, 2 Con. & L. 60; *Fraser* v. *Thompson*, 1 Giff. 62. Marriage is regarded as one of the strongest considerations in the law, either to raise a use, found a contract, gift, or grant. *Holder* v. *Dickeson*, Freem. C. L. Rep. 96; *Smith* v. *Stafford*, Hob. 216*a*; *Waters* v. *Howard*, 8 Gill, 262. In a case which arose in Maryland, it was held that an agreement made by a father with his daughter in consideration of her marriage, and by way of advancement and marriage endowment, consummated by marriage, as then contemplated, could not be revoked by the father, Martin, J., saying that the daughter was regarded as a purchaser, as much so as if she had paid for the property an adequate pecuniary consideration, and that the consummation of the marriage was to be considered as the payment of the purchase money. *Dugan* v. *Gittings*, 3 Gill, 138. A similar ruling was made where a father promised a man about to marry his daughter that, on the marriage he would give him a sum of money, and the marriage having occurred, the father was compelled specifically to perform his promise. *Chichester* v. *Vass*, 1 Munf. 98, 4 Am. Dec. 531. Yet, notwithstanding this, it is ruled that, as between the parties to the wedlock, the celebration of the marriage is not such part performance as to take it out of the statute. 2 Parsons, Contr. 7th ed. 77; Fry, Spec. Perf. 3d ed. § 593. Commenting on this anomaly in equity jurisprudence, Judge Story says: "The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case, standing on its own grounds." 2 Story, Eq. Jur. 13th ed. § 768. See also note to section 720, Throop, Validity of Verbal Agreements, and cases cited; among them, *Durham* v. *Taylor*, 29 Ga. 166. "But though marriage be not, cohabitation may be, a sufficient act of part performance. In a separation deed, the husband covenanted with a trustee for the payment of an annuity to his wife. Shortly before the death of the husband, his wife returned to him, upon the faith of a promise made by the husband to the wife and her trustee that, if she would do so, he would continue to pay the annuity, and would charge it upon his real estate. He died without having done so, and it was held that the contract could be enforced against the devisees of the husband, on the ground of part performance." *Webster* v. *Webster*, 1 Smale & G. 489, Affirmed 4 De G. M. & G. 437; Fry, Spec. Perf. § 597. This divergence between marriage and other valuable considerations in respect to the doctrine of part performance caused Vice Chancellor Malins to express his regret that such an exception was ever made. *Ungley* v. *Ungley*, L. R. 4 Ch. Div. 73; *Coles* v. *Pilkington*, L. R. 19 Eq. 174. In a case which came to the House of Lords, where the old rule that marriage was not part performance was in terms (though unnecessarily) reasserted, Lord Cottenham very forcibly presented the equitable ground for the contrary opinion, remarking: "The principle . . . of equity is this,—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately, plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal." *Hammersley* v. *Baron De Biel*, 12 Clark & F. 45. The true basis of specific performance being enforced is that, unless enforced, it would operate a fraud on the party who seeks its enforcement, it being impossible to restore such party to his *status quo*. Browne, Stat. Fr. §§ 448, 487, and cases cited; 2 Story, Eq Jur. § 761, and cases cited. "The fraud," says Judge Wells in *Glass* v. *Hulbert*, "most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so

that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss." *Glass* v. *Hulbert*, 102 Mass. 35, 3 Am. Rep. 418. Now, it would seem that, marriage being such a valuable consideration, its celebration in conformity to a previous parol promise made, placing especially as it does the female contracing party in a situation where she cannot be restored to her former condition, ought to be regarded as such a henious fraud upon her if such parol promise be not performed as a court of conscience should not tolerate, but acting on principle, rather than precedent, should decree the complete enforcement of such agreement, notwithstanding the statute. This is what courts of equity are doing in other cases every day, despite the statute, and no sound reason can be urged why a court of equity should grant relief in the latter class of cases, and refuse it in the former. Indeed, more cogent reasons appear to exist in favor of disregarding the statute in instances like the present than in ordinary cases. This view of the matter is also entertained by the learned author heretofore cited. Browne, Stat. Fr. § 459. Instances are by no means infrequent where contracts between husband and wife entered into before marriage will be enforced in equity, although they should be avoided at law; "for equity will not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract." 2 Story, Eq. Jur. § 1370, and cases cited.

6. For these reasons, inasmuch as we are not hampered by former rulings in this court on this point, we hold that marriage in the circumstances disclosed by the record does amount to a valuable consideration and part performance; and that plaintiff having done on his part all that it was contracted by his mother he should do, the contract made by his mother for herself and him having been fully executed on their parts, this constitutes of itself a distinct and independent reason why the statute should not be allowed to obstruct the pathway to the relief plaintiff seeks.

7. The premises considered, a decree will be entered in this court in favor of plaintiff in accordance with the facts found by the lower court, giving him one fourth of all the real and personal estate left by Eberhard H. Schweer, and requiring contribution on the part of the three sons of Schweer; but this will be done subject, of course, to the rights of the widow as directed by the will. And, further, the decree must accord to the minor heirs of plaintiff what the will has directed should be theirs; but, of course, the devise to them cannot be permitted to diminish what plaintiff became entitled to under the agreement made by his mother with Schweer. Plaintiff will take in value, in real and personal property, precisely what he would have taken had his children not been mentioned in the will, to wit, the one-fourth part in value of all real and personal property of which Schweer died seised. Inasmuch, however, as those heirs have been compelled to come to this court in order to secure their rights, the cost of this appeal as between them and their father, will be taxed against him.

All concur.

Rehearing denied.

MISSOURI SUPREME COURT (In Banc).

Joseph R. EDWARDS, *Respt.*,
v.
A. A. LESUEUR, *Appt.*

(.....Mo.....)

1. **The establishment of the seat of government** of a state is a proper subject of constitutional control and therefore of constitutional amendment.

2. **Conditions imposed and powers delegated by a proposed constitutional amendment to change the location of the seat of state government** whereby, in addition to the vote of the people which the existing Constitution requires for an amendment, donations of property and the erection of state buildings to be approved and accepted by a commission are made a condition of the change of location, will not make the proposed amendment inoperative, since, upon the vote of the people adopting the amendment, the conditions will be imposed and the powers delegated by the Constitution itself.

3. **The power to select and afterwards to change its own seat of government** if deemed expedient is necessarily implied in a state Constitution providing for a Republican form of government not repugnant to the Constitution of the United States, and making no limitation upon its political or governmental power or the power to manage its own internal affairs.

4. **An implied contract against the removal of the seat of state government** from its original location is not made with property owners at that place by its location there.

5. **There can be no irrepealable law** to prevent the removal of the seat of state government, as this involves a governmental subject.

6. **A vote in favor of a proposed constitutional amendment taken by yeas and nays** and entered in full on the legislative journals in full compliance with the constitutional provisions on this subject is sufficient without having the resolution read on different days or in other respects taking the course required for ordinary legislation.

NOTE.—As to the power of the court to determine the question of the adoption of a state Constitution, see Miller v. Johnson (Ky.) 15 L. R. A. 524, and *note*.

For other cases as to adoption of constitutional amendments, see State, Torryson, v. Grey (Nev.) 19 L. R. A. 134; Seneca Min. Co. v. Secretary of State (Mich.) 9 L. R. A. 770; Worman v. Hagan (Md.) 21 L. R. A. 716; Livermore v. Waite (Cal.) 25 L. R. A. 812.

31 L. R. A.

See also 34 L. R. A. 97.

(February 5, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Cole County enjoining him from proceeding to submit to the vote of the electors of the state a proposed amendment to the state Constitution which was intended to change the place of the seat of government. *Reversed.*

Statement by **Macfarlane, J.:**

This is a suit by plaintiff, as a property owner of Jefferson city, to restrain the secretary of state from discharging the duties enjoined upon him in respect to submitting to a vote of the electors of the state a proposal, passed by the last general assembly, for amending the Constitution so as to provide therein for the removal of the seat of government from the city of Jefferson to the city of Sedalia. The amendment was proposed under a concurrent resolution, and is as follows:

"Concurrent resolution submitting to the qualified voters of Missouri an amendment to the Constitution thereof, providing for the removal of the seat of government from the city of Jefferson to the city of Sedalia.

"Be it resolved by the house of representatives, the Senate concurring therein, as follows: At the general election to be held on Tuesday next following the first Monday in November, A. D. 1896, an amendment to the Constitution of Missouri shall be submitted to the qualified voters of the state in the following words: 'The seat of government shall be removed from the city of Jefferson and located at the city of Sedalia. Any person or persons may grant or donate to the state any land, sum of money, or other thing of value to be used for the purpose of erecting the necessary public buildings at the city of Sedalia, or may deposit with the governor sufficient securities or obligations to guarantee the erection of such buildings. Whenever a suitable capitol building, having the same or greater floor area and appointments as the present capitol and supreme court buildings, and equal thereto in stability and architectural merit, together with grounds of the same or greater area, and an armory building likewise similar or superior to the present armory, and an executive mansion likewise similar or superior to the present building used as the governor's residence, together with the grounds and appurtenances, shall be erected at the city of Sedalia, the same shall be accepted by a commission, consisting of the governor, secretary of state, auditor, treasurer, and attorney general, and such officers shall at once remove the public records and personal property to such new buildings, and the city of Sedalia shall thereupon become the permanent seat of government. The plans and location of the capitol, armory, and executive mansion and grounds shall first be approved by such commission. The county of Pettis and Sedalia township, in said county, may each vote an issue of twenty-five nontaxable 3 per cent bonds, not to exceed in amount, respectively for each, $100,000, and such bonds may be ordered issued by a majority vote of those voting at a special election called for that purpose by the county court, and conducted generally in the manner provided by law for the issuing of bonds for the erection of court-houses. Said county and township bonds shall be given to the state for the purpose of assisting in paying for the erection of the buildings provided for herein; and such bonds, if voted and issued, shall be delivered to the governor of the state, and held by him in trust for the benefit of any person or persons who may erect such suitable public buildings, to be given to such person or persons on their completion and acceptance. The commission hereby constituted shall have full power, by a majority vote, to carry out the provisions and intent of this amendment, and such new public buildings shall be completed, as near as may be possible, on or before the 1st day of November, A. D. 1899, unless such commission, for good cause, grant further time. The state shall in no manner become liable for, nor shall it pay any part whatever of the cost of the new public buildings herein provided for, and the county before mentioned shall pay the entire cost of moving the records and personal property of the state to the new public buildings, so that the state shall be at no expense whatever in the change of the seat of government.'"

It is charged in the petition that said resolution is, and if adopted, will be, invalid, for the reason that it does not provide that the same shall go into effect "as an operative amendment to said Constitution, upon its adoption by a majority of the qualified voters of the state voting in favor thereof, but, on the contrary, by its terms and provisions, its taking effect, and becoming an operative and binding part of said Constitution, is made to depend on the further facts or condition that some person or persons shall donate or grant to the state land or money or other valuable thing, for the purpose, or erect the necessary public buildings at the city of Sedalia for the use of the state, or shall deposit with the governor of the state sufficient securities or obligations to guarantee the erection of such building, and also on the further fact or condition that a suitable capitol building for the state of Missouri, having the same or greater floor area and appointments than the present capitol and supreme court buildings, and equal thereto in stability and architectural merit, together with grounds of the same or greater area than those now possessed by the state at the city of Jefferson, and also that a state armory and executive mansion similar or superior to the present ones owned by the state, together with grounds and appurtenances thereto, shall be erected or furnished at the city of Sedalia, and shall be accepted by a commission consisting of the governor, secretary of state, state auditor, treasurer, and attorney general of Missouri, and also on the further fact or condition that the plans and location of said new capitol building, armory, executive mansion and grounds therefor, shall be approved by said commission." It is further charged that the resolution is invalid, and, if adopted by the necessary vote of the people, would not become an amendment to the Constitution, for the reason that it was not read on three different days in each house of the general assembly, and did not take the course of a bill in said assembly. A further charge is that, by the act of Congress admitting the state of Missouri into the

Union, the action of the convention of the territory called in pursuance of said act, and the subsequent legislation of the state in accepting and acting upon the conditions of said act, the sea of government was established at Jefferson City, and cannot be changed without the consent of the United States. It was also charged, in substance, that under said enabling act, and the acceptance thereof by the people of the territory, certain lands were donated by the United States to the state of Missouri, upon which to locate its seat of government, and such lands were sold by the state with the assurance to purchasers that the seat of government would permanently remain at the city of Jefferson, and such purchasers, and their assigns, relying on the good faith of the state, made valuable and lasting improvements thereon, by reason of all which they acquired certain vested rights, which should be protected and preserved. A general demurrer to the petition was overruled, and, defendant refusing to plead further, judgment was rendered for plaintiff on the demurrer, and a perpetual injunction was granted. From this judgment defendant appealed.

Messrs. **R. F. Walker,** Attorney General, **Lee & McKeighan,** and **John H. Bothwell,** for appellant:

Missouri is a free and independent state, and all political power is vested in the people, from whom government originates, and who have the inherent, sole, and exclusive right to alter or revise their Constitution to any extent they may choose, subject only to the limitations of the Constitution of the United States.

Mo. Const. art. 2, §§ 1–3; Cooley, Const. Lim. 6th ed. chap. 3, pp. 41, 45; Black, Const. Prohibitions, pp. 44–49; Potter's Dwarr. Stat. ed. 1871, 346–348; *Blair* v. *Ridgely*, 41 Mo. 63, 97 Am. Dec. 248; *Wells* v. *Bain*, 75 Pa. 39, 15 Am. Rep. 563; *Re Gibson*, 21 N. Y. 9.

The Constitution of this state is specific, careful, and complete in its provision for originating and holding a convention for revising and amending the Constitution; and where general revision or amendment is not considered necessary, the general assembly has full power to propose such specific amendments as a majority of the members elected to each house shall deem expedient.

Mo. Const. art. 15, §§ 1–3.

A proposed constitutional amendment need not be read in each House of the general assembly on three separate days, nor need it take the course of a bill.

Mo. Const. art. 5, § 14, art. 15, §§ 1, 2; Jameson, Const. Conv. 4th ed. §§ 541–543; 3 Cyc. of Political Science, pp. 802, 803; 1 Stimson, Am. Stat. Law, p. 133, §§ 990–996.

In proposing an amendment to the Constitution, the general assembly exercises delegated political power, not ordinary legislative authority. Its members may propose any specific amendment which they may deem expedient, and they are not limited by directions or restrictions made applicable by the Constitution to ordinary legislative acts alone.

Mo. Const. art. 15, §§ 1, 2; Borgeaud, Adoption and Amendment of Constitutions, pp. 188, 323; Jameson, Const. Conv. 4th ed. §§ 547–555, and cases cited; 1 Stimson, Am. Stat. Law, p. 133, §§ 990–996; 3 Cyc. of Political Science, pp. 802, 803; 1 Bryce, Am. Commonwealth, 2d ed. pp. 419–423; *State, Morris,* v. *Mason,* 43 La. Ann. 590; *Nesbit* v. *People,* 19 Colo. 441; *State* v. *Cox,* 8 Ark. 436.

Wide latitude is indulged in favor of propositions to amend state Constitutions.

Jameson, Const. Conv. 4th ed. chap. 8, Amend. Const. p. 9; *University of North Carolina* v. *McIver,* 72 N. C. 76; *State, Torreyson,* v. *Grey,* 21 Nev. 378, 19 L. R. A. 134; *Re Gibson,* 21 N. Y. 9; *Collier* v. *Frierson,* 24 Ala. 100; *Constitutional Prohibitory Amendment,* 24 Kan. 700; *State, Hudd,* v. *Timme,* 54 Wis. 318; *State* v. *McBride,* 4 Mo. 303, 29 Am. Dec. 636; *Worman* v. *Hagan,* 78 Md. 152, 21 L. R. A. 716; *State, Morris,* v. *Mason, supra; Nesbit* v. *People,* 19 Colo. 441; *State, Woods,* v. *Tooker,* 15 Mont. 8, 25 L. R. A. 560; *State* v. *Cox, supra.*

State Constitutions now are often used to enact fundamental laws by ratification of the voters, which would otherwise be left to ordinary legislation or be in conflict with other provisions of the organic law.

Mo. Const. arts. 9–14; 1 Stimson, Am. Stat. Law, § 1, pt. 1, note; Borgeaud, Adoption and Amendment of Constitutions, introductory note, pp. 9, 10, 40, 146–151; 1 Bryce, Am. Commonwealth, 2d. ed. pp. 419, 429, 436, 438, 441, 442, and 447; Poore, Federal and State Constitutions, vols. 1, 2; *State, Morris,* v. *Mason, supra.*

No provision of the present or any former state Constitution has ever expressly established the seat of government at Jefferson City.

Mo. Const. 1820, art. 11, §§ 1–4; Mo. Laws 1821.

After the capital was established at Jefferson City, the people by express constitutional limitation subsequently withdrew from the legislative department the power to remove the seat of government by simple legislative act. But for that express limitation the seat of government might be removed by ordinary statute law, because the exceptions to a power granted mark its extent.

Mo. Const. 1865, art. 11, § 10; Id. 1875, art. 4, § 56; *Gibbons* v. *Ogden,* 22 U. S. 9 Wheat. 191, 6 L. ed. 69; *Brown* v. *Maryland,* 25 U. S. 12 Wheat. 438, 6 L. ed. 685; *Morris* v. *Powell,* 125 Ind. 281, 9 L. R. A. 326; *State, Lamb,* v. *Cunningham,* 83 Wis. 90, 17 L. R. A. 145.

Neither in the "enabling act," passed by Congress in 1820, nor in the "ordinance of acceptance" of the constitutional convention of the state, will be found anything which deprives or limits the state in its sovereign right to re-establish its seat of government.

Act of Congress 1820, 1 Mo. Rev. Stat. pp. 47–50; Ordinance of Acceptance 1820, 1 Mo. Rev. Stat. 1889, pp. 51–63; Cooley, Const. Lim. 6th ed. pp. 473, 474; 4 Am. & Eng. Enc. Law, p. 403; 2 Beach, Inj. § 1390; *Armstrong* v. *Dearborn County Comrs.* 4 Blackf. 208; *Elwell* v. *Tucker,* 1 Blackf. 285; *Newton* v. *Mahoning County Comrs.* 26 Ohio St. 618, 100 U. S. 548, 25 L. ed. 710; *Alley* v. *Denson,* 8 Tex. 297; *Gilmore* v. *Haywerth,* 26 Tex. 89; *Harrell* v. *Lynch,* 65 Tex. 149; *Adams* v. *Logan County,* 11 Ill. 336; *Harris* v. *Shaw,* 13 Ill. 456; *Atty. Gen.* v. *Lake County Supers.* 33 Mich. 289.

If the expression of the will and desire of

the enacting power be complete and final, then the law is valid and binding when enacted, even where its terms provide for certain acts by others, and for certain facts or conditions to be ascertained or found before certain prescribed results shall follow.

Sedgw. Stat. & Const. L. 2d ed. pp. 135–138, and cases cited; Cooley, Const. Lim. 6th ed. pp. 98–101, 137–146, and cases cited; Mo. First Const. (1820) art. 11, §§ 1–4; *Walton* v. *Greenwood*, 60 Me. 356; *State* v. *Parker*, 26 Vt. 357; *Pratt* v. *Allen*, 13 Conn. 119; *Lothrop* v. *Stedman*, 42 Conn. 583; *Newton* v. *Mahoning County Comrs.* 26 Ohio St. 618; *Starin* v. *Genoa*, 23 N. Y. 439; *Bank of Rome* v. *Rome*, 18 N. Y. 38; *The Aurora* v. *United States*, 11 U. S. 7 Cranch, 382, 3 L. ed. 378; *State, Park,* v. *Portage County Supers.* 24 Wis. 49; *Callam* v. *Saginaw*, 50 Mich. 7; *State, Maggard,* v. *Pond*, 93 Mo. 606; *Ex parte Swann*, 96 Mo. 44; *Lammert* v. *Lidwell*, 62 Mo. 188, 21 Am. Rep. 411; *St. Louis City & County* v. *Alexander*, 23 Mo. 483; *Moers* v. *Reading*, 21 Pa. 188; *Locke's Appeal*, 72 Pa. 491; *People, Vermule,* v. *Bigler*, 5 Cal. 23.

The general assembly has necessarily the right to construe the Constitution in exercising its delegated powers, and the courts will presume that legislative acts based on legislative construction of the organic law are constitutional, unless it is shown that the legislative act was and is void because necessarily repugnant to some specific clause of the Constitution pointed out.

Cooley, Const. Lim. 6th ed. pp. 45, 54, 192–222 *et seq.*; *State, Maggard,* v. *Pond, supra; Kelly* v. *Meeks*, 87 Mo. 396; *Phillips* v. *Missouri P. R. Co.* 86 Mo. 540; *State* v. *Addington*, 77 Mo. 110; *State, Harris,* v. *Laughlin*, 75 Mo. 147; *State* v. *Able*, 65 Mo. 357; *State, Circuit Atty.* v. *Cape Girardeau & S. L. R. Co.* 48 Mo. 468; *Stephens* v. *St. Louis Nat. Bank*, 43 Mo. 390; *Hamilton* v. *St. Louis County Ct.* 15 Mo. 13; *Edwards* v. *Williamson*, 70 Ala. 145; *Ex parte Selma & G. R. Co.* 45 Ala. 696, 6 Am. Rep. 722.

Messrs. **A. M. Hough, Jacob C. Fisher, J. W. Zevely, Karnes, Holmes & Krauthoff, Silver & Brown, W. S. Pope, J. R. Edwards,** and **H. Clay Ewing,** for respondent:

Plaintiff, as a citizen and taxpayer of the city of Jefferson, and of the state of Missouri, is entitled to maintain this injunction proceeding to contest the validity of the proposed constitutional amendment, and, if the same be invalid, to restrain the secretary of state from taking the steps provided for its submission to the voters of the state.

Livermore v. *Waite*, 102 Cal. 113, 25 L. R. A. 312; *State, Hughlett,* v. *Hughes*, 104 Mo. 459; *Francis* v. *Blair*, 89 Mo. 291; *Valle* v. *Ziegler*, 84 Mo. 214; *Ewing* v. *Jefferson City Bd. of Edu.* 72 Mo. 436; *Wagner* v. *Meety*, 69 Mo. 150; *Ranney* v. *Bader*, 67 Mo. 476; *Matthis* v. *Cameron*, 62 Mo. 504; *Rubey* v. *Shain*, 54 Mo. 207; *Newmeyer* v. *Missouri & M. R. Co.* 52 Mo. 81, 14 Am. Rep. 394; *State, Circuit Atty.* v. *Saline County Ct.* 51 Mo. 350.

The proposed amendment, in the form submitted, is not authorized by the Constitution, art. 15, §§ 1, 2.

The Constitution being amendable only in pursuance of the provisions contained in the Constitution itself, the mode prescribed is the measure and the limit of the power to amend.

Russie v. *Brazzell*, 128 Mo. 93; *State* v. *McBride*, 4 Mo. 303, 29 Am. Dec. 636; *Collier* v. *Frierson*, 24 Ala. 100; *Constitutional Prohibitory Amendment*, 24 Kan. 700; *Opinion of the Justices*, 6 Cush. 573; *State* v. *Swift*, 69 Ind. 505; *Re Constitutional Convention*, 14 R. I. 649; *Koehler* v. *Hill*, 60 Iowa. 543; *State, Stevenson,* v. *Tufly*, 19 Nev. 391; *Wells* v. *Bain*, 75 Pa. 40, 15 Am. Rep. 563; *Oakland Paving Co.* v. *Hilton*, 69 Cal. 479; *State, Morris,* v. *Mason*, 43 La. Ann. 590; *Miller* v. *Johnson*, 92 Ky. 589; Cooley, Const. Lim. 6th ed. pp. 42, 43; Jameson, Const. Conv. § 25.

The general assembly, in proposing amendments to the Constitution, does not act in the exercise of its legislative authority, but as a special agent empowered by an express grant.

Hatch v. *Stoneman*, 66 Cal. 632; *Livermore* v. *Waite*, 102 Cal. 113, 25 L. R. A. 312; *Re Senate File 31*, 25 Neb. 864; *Nesbit* v. *People*, 19 Colo. 441; Cooley, Const. Lim. 6th ed. pp. 42, 44; Jameson, Const. Conv. § 25.

The state legislatures exercising their ordinary legislative functions have all such powers as have not been surrendered or prohibited to them.

Hall v. *Wisconsin*, 103 U. S. 5, 26 L. ed. 302; Cooley, Const. Lim. 6th ed. 206.

The rule that all the presumptions are in favor of the constitutionality of an ordinary legislative enactment, and that it will not be held unconstitutional unless clearly so, obviously does not apply to constitutional amendments coming through the legislative department as a special agency, or having their origin in an express warrant.

Livermore v. *Waite, supra; Oakland Paving Co.* v. *Hilton*, 69 Cal. 489; Cooley, Const. Lim. 6th ed. pp. 39, 93, 94; *Koehler* v. *Hill*, 60 Iowa, 568.

The Constitution does not authorize or permit the legislature to propose an amendment thereto which will not, upon its adoption by the people, become an effective part of the Constitution, nor one which, if ratified, will take effect only at the will of other persons or upon the approval of such other persons of some specified act or condition.

Livermore v. *Waite, supra.*

The legislature is only permitted to submit an amendment, not something that is not an amendment, under the designation of an amendment.

Cooley, Const. Lim. 6th ed. p. 57, note.

The future event, the happening of the contingency, or the fulfilment of the condition on which a law, even in the case of an ordinary legislative enactment, takes effect, can afford no additional efficacy to the law; it must be "complete and effective when passed."

State, Dome, v. *Wilcox*, 45 Mo. 458; *Lammert* v. *Lidwell*, 62 Mo. 188, 21 Am. Rep. 411.

An unconstitutional enactment is not a law; it binds no one and protects no one.

Little Rock & Ft. S. Railway v. *Worthen*, 120 U. S. 97, 30 L. ed. 588.

Every department of the government, and every official of every department, may, at any time when a duty is to be performed, be re-

quired to pass upon a question of constitutional construction.

Cooley, Const. Lim. 6th ed. p. 54.

The proposed amendment is objectional because it involves the delegation of legislative power to the commissioners and other persons referred to therein.

Ruggles v. *Collier*, 43 Mo. 353; *St. Louis, Murphy*, v. *Clemens*, 43 Mo. 395; *Saline County* v. *Wilson*, 61 Mo. 237; *Matthews* v. *Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *St. Louis* v. *Russell*, 116 Mo. 248, 20 L. R. A. 721; *St. Louis* v. *Howard*, 119 Mo. 41.

The general assembly cannot by statute define the term "constitutional amendment" so as to bind the courts.

Cooley, Const. Lim. 6th ed. p. 57, note 1; *State, Baltimore*, v. *Kirkley*, 29 Md. 85; *Ruggles* v. *Collier, supra; State, Benton*, v. *Boice County Comrs.* 140 Ind. 506; *Folsom* v. *Township of Ninety-Six*, 59 Fed. Rep. 67; *Quaker City Nat. Bank* v. *Nolan County*, 59 Fed. Rep. 660, Aff'd in 66 Fed. Rep. 883.

A law may be within the inhibitions of the Constitution as well by implication as by expression.

Evansville v. *State, Blend*, 118 Ind. 426, 4 L. R. A. 93; Cooley, Const. Lim. 6th ed. p. 207.

And when it is, it is the duty of the courts to so declare.

Page v. *Allen*, 58 Pa. 338, 98 Am. Dec. 272; *People* v. *Gillson*, 109 N. Y. 389.

The state cannot under the act admitting it into the Union, and its ordinance accepting the same, change its permanent seat of government without the consent of the United States.

Congressional Act of Admission, Mo. Rev. Stat. 1825, pp. 35–39; Ordinance of Acceptance, Mo. Rev. Stat. 1825, pp. 40–42; *Lessieur* v. *Price*, 53 U. S. 12 How. 59, 13 L. ed. 893; *Lessieur* v. *Price*, 12 Mo. 14.

When a state descends from the plane of its sovereignty, and enters into a contract, it is bound like an individual.

Davis v. *Gray*, 83 U. S. 16 Wall. 232, 21 L. ed. 457; Cooley, Const. Lim. 6th ed. pp. 328, 330, note 4.

Macfarlane, J., delivered the opinion of the court:

1. It has been said that "the right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised, except in very clear cases; one department of the government is bound to presume that another has acted rightly." *State* v. *Addington*, 77 Mo. 117. The power and jurisdiction of the judiciary to declare a proposal for an amendment to the Constitution ineffectual, and to arrest its submission to the people, which we are now called upon to exercise, is coupled with far more serious responsibilities. To so declare would wrest from the people the expressly reserved power to amend their organic law as they may deem fit and expedient. In respect to the subject of amendments to the Constitution, that instrument declares: "The people of this state have the inherent . . . right . . . to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the Constitution of the United States." Const. 1875, art. 2, § 2. That all just government is founded upon the consent of the people is a maxim which has been held sacred by the American people since the Declaration of Independence, in 1776. Under our system, the people are the source of all governmental power. In recognition of this principle, the people of this state, first in delegated convention, and afterwards by their own voice, through the polls, proclaimed, in their bill of rights (§ 1), "that all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Upon the adoption of the Constitution of 1875 by a popular vote, the direct power of the people was withdrawn from governmental affairs; and the administration of the functions of government was delegated to the executive, legislative, and judiciary departments of state, to be exercised by officers selected by the people, with such limitations upon the powers of each as they saw fit to impose. But the right to govern was not thereby surrendered or abandoned. The power was reserved to resume control, either of any special subject-matter, by amendment of their organic law, or of the entire subject of government, by means of a constitutional convention. This reserved power is declared in §§ 1, 2, and 3 of article 15. Sections 1 and 2, relating to amendments, read:

"Sec. 1. This Constitution may be amended and revised only in pursuance of the provisions of this article.

"Sec. 2. The general assembly may, at any time, propose such amendments to this Constitution as a majority of the members elected to each House shall deem expedient; and the vote thereon shall be taken by yeas and nays, and entered in full on the journals. The proposed amendments shall be published with the laws of that session, and also shall be published weekly in some newspaper, if such there be, within each county in the state, for four consecutive weeks next preceding the general election then next ensuing. The proposed amendments shall be submitted to a vote of the people, each amendment separately, at the next general election thereafter, in such manner as the general assembly may provide. If a majority of the qualified voters of the state, voting for and against any one of said amendments, shall vote for such amendment, the same shall be deemed and taken to have been ratified by the people, and shall be valid and binding, to all intents and purposes, as a part of this Constitution."

It will be seen that no measure of power over any governmental subject has been wholly surrendered. Power is retained, and through the action of the general assembly, which is composed of the nearest representatives of the people, control may be resumed, over any subject-matter, and changes made in the organic law in respect thereto. It is true, the general assembly can only propose amendments under

the power delegated to it by the people. This power must be construed according to the general principles which govern courts in the construction of delegated powers. In the exercise of such power, every substantial requirement must be observed and followed, or there can be no valid amendment. In respect to the mode of proposal and submission, the provisions of the Constitution must be regarded as absolute. The courts should not hesitate to see that the Constitution is obeyed in these particulars. *State* v. *McBride*, 4 Mo. 306, 29 Am. Dec. 636. But whether the courts have jurisdiction to come between the people and their authorized and accredited agents and representatives, and arrest their will in respect to what the organic law should be, is an entirely different and more serious question. The Constitution is intended for observance by the judiciary as well as other departments of government. The judges are sworn to support the Constitution, and the provision for its amendment is as obligatory upon the courts as any other part of it. "The general assembly may, at any time, propose such amendments to this Constitution as a majority of the members elected to each House shall deem expedient," is the unequivocal letter of attorney given by the people. No stronger language could have been used to express authority as unlimited as the subject upon which the agent is authorized to act. The character—that is, the substance and extent—of the amendments is left entirely and exclusively to the discretion of the general assembly. The right to propose is as unlimited as is the right to adopt by vote of the people themselves. It is as unlimited as would be the power of a regularly called and constituted convention to propose specific provisions. The courts have nothing to do with the wisdom or policy of such proposal. The people have reserved the power of review to themselves. Amendments derive their force from the action of the people, and not from the action of the assembly which proposes them. The power—or, rather, the want of power—in the courts to review the policy or wisdom of constitutional amendments is thus expressed by Mr. Justice Brewer (then of the supreme court of Kansas) in *Constitutional Prohibitory Amendment*, 24 Kan. 709. "But the questions of policy are not questions for the courts. They are wrought out and fought out in the legislature and before the people. Here the single question is one of power. We make no laws; we change no Constitutions; we inaugurate no policy. When the legislature enacts a law, the only question which we can decide is, whether the limitations of the Constitution have been infringed upon. When a constitutional amendment has been submitted, the single inquiry for us is, whether it has received the sanction of popular approval in the manner prescribed by the fundamental law. So that whatever may be the individual opinions of the justices of this court as to the wisdom or folly of any law or constitutional amendment, and notwithstanding the right which as individual citizens we may exercise with all other citizens in expressing through the ballot box our personal approval or disapproval of proposed constitutional changes, as a court, our single inquiry is, have constitutional requirements been observed, and limits of power been regarded? We have no veto."

There can be no doubt that the question of the establishment of the seat of government is one which is a proper subject of constitutional control, and is therefore a proper subject for amendment. If the people had seen fit, they could have given power to the general assembly to change the seat of government upon any terms it might require. Indeed, the power might have been delegated to the governor, or this court, or to commissioners as was done by the convention of 1820. But no such power was granted, nor did the people remain silent on the subject, and thus leave the matter to the discretion of the assembly, but negatived such power by declaring, "The general assembly shall have no power to remove the seat of government from the city of Jefferson." Const. 1875, art. 4, § 56. It is plain that, in order to secure a removal of the capital, an amendment to the Constitution is necessary. The general assembly deemed it proper that the expediency of a removal to Sedalia should be submitted to the people. It is not seriously insisted that an unconditional proposal for removal would not have been valid. But it is insisted that the amendment, as proposed, is — and, though adopted by the people, would be—invalid on account of the conditions annexed thereto, and the powers delegated to certain officials. What has been said in reference to the unlimited discretion of the general assembly should be a sufficient answer to this objection. The objection is directed against the wisdom of the measure and its expediency. As has been said, these are questions upon which the people are to pass, and over which the courts have no power. The amendment derives its force from the people, and not from the legislature. If ratified, "it shall be valid and binding to all intents and purposes as a part of this Constitution" is the language of that instrument. Every condition and every delegation of power contained in the amendment will come direct from the people, as a part of the organic law. The people have placed no limitation on their own power in this respect. It will be observed, also, that the amendment does not propose to effect a change in the location of the seat of government, but to provide the means by which a change can be effected. It might have delegated the power to the general assembly to make the change. Instead of doing so, it has provided a means much more complicated, but which the courts are bound to uphold and respect. The people are to judge of the practicability of the methods proposed. If the amendment is adopted it ceases to be a mere resolution of the assembly and becomes, "to all intents and purposes," a part of the Constitution. The conditions will be imposed and the power will be delegated by the Constitution itself.

Much reliance is placed by the plaintiff upon the authority of the case of *Livermore* v. *Waite*, 102 Cal. 114, 25 L. R. A. 312, in support of his position. While we have great respect for the supreme court of California, and the distinguished jurists who compose it, yet if the opinion is to be taken as holding that, under such powers as our Constitution confers

upon the general assembly in respect to proposing amendments, a proposed amendment, which, by the terms of the Constitution, is to become valid and binding to all intents and purposes, upon its adoption by the people, will be ineffective because conditions are therein imposed and powers are thereby delegated, we are unwilling to give our assent to it. We do not deem it necessary to analyze that opinion, in order to show that no such principle was announced, though expressions used by the judge who wrote the opinion may be open to such construction.

2. The petition charges that, by the act of Congress admitting the state of Missouri into the Union, the action of the convention called in pursuance of said act, and subsequent legislation of the state in conformity to the conditions of said act, the seat of government was established at Jefferson City, and cannot be removed therefrom without the consent of the United States, or to the loss and injury of those who have purchased and improved property in reliance upon the obligation of the state to permanently maintain it there. The control of the United States is supposed to result from the terms of admission proposed by Congress and accepted by the convention. Section 6 of the enabling act (Rev. Stat. 1889, p. 49) provides "that the following propositions be and the same are hereby offered to the convention of the territory of Missouri, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States." These propositions (five in number) provided for grants of land by the United States to the state of Missouri. The fourth proposition is as follows: "Fourth. That four entire sections of land be and the same are hereby granted to the said state, for the purpose of fixing their seat of government thereon; which said sections shall, under the direction of the legislature of said state, be located as near as may be, in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States." These propositions were upon the condition that the convention should provide, "by an ordinance irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the 1st day of January next shall remain exempt from any tax laid by order or under the authority of the state." The convention of the territory in accepting the terms of admission, declared: "And this convention for and in behalf of the people inhabiting this state, and by authority of said people, do further ordain, decree and declare that this ordinance shall be irrevocable without the consent of the United States." The convention also framed a Constitution, article 9 of which was devoted to the subject of the seat of government of the state, and provided that the legislature should appoint five commissioners for the purpose of selecting the land to be donated, and also a permanent seat of government. If the four sections of land selected were not deemed suitable for a site, they were authorized to select another, and to purchase the necessary land. If the land selected was approved, the commissioners were authorized to lay out a town under the directions of the general assembly. The commissioners were duly appointed by the general assembly; they selected land upon which the city of Jefferson is located; their selection was approved; a town was laid out; lots were sold by the state; and, by an act of the legislature, the permanent seat of government was located at the city of Jefferson, where it has since remained. The contention is that under those various proceedings the state became irrevocably bound to maintain its seat of government at Jefferson City, unless by the consent of the United States, and also that the property owners have secured vested rights in the location of the capital, which the state has no power to take from them, even by a constitutional amendment.

In answer to the first proposition, it may be said, in the first place, that no such condition was coupled with the proposal submitted by the act of Congress. The acceptance should not be construed to be broader than the offer. The irrevocable character of the ordinance must be construed to refer to the conditions which were required to be irrevocable. In the second place, the convention which accepted the terms proposed by Congress, and which formed the state Constitution, did not interpret the act as requiring that the seat of government should be located on the four sections of land which might be selected, for it provided that the commissioners might purchase other land upon which to locate its seat of government. The convention would hardly have made an irrevocable agreement, and immediately proceeded to violate it. Third, the act of admission required a copy of the Constitution, when framed, to be transmitted to Congress. We must presume that the convention did its duty in this regard, and that Congress knew the interpretation that had been given to the grant, and, as the state government has ever been recognized by the United States, that it was satisfied with such interpretation, and ratified it. In the fourth place, the plain terms of the compact negative any intention of the United States to control the state in the future changes of its seat of government. The fourth section of the act authorized the convention to form its own Constitution and state government, provided it should be republican in form, and not repugnant to the Constitution of the United States. No limitation whatever is placed upon its political or governmental power, or the power to manage its own internal affairs. The power, then, to select, and afterwards, if deemed expedient, to change, its own seat of government, is necessarily implied.

3. Nor have the property owners of the city of Jefferson secured such vested rights in the location of the city government, by reason of any implied contract with the state, as will prevent its removal. The Constitution of 1820 declared the exclusive right of the people to regulate the internal government of the state, and to alter their Constitution whenever deemed necessary to their safety and happiness. The reserved power is thus declared by the same convention that accepted the terms of admission of the state into the Union. By this declaration the convention clearly negatives the idea of an intention to bind all future

generations to forever maintain the seat of government at such places as might thereafter be selected by commissioners to be appointed by a future legislature. But neither the convention nor the legislature had power, in this respect, to irrevocably bind the people of the state. The right of the people to establish and remove their seat of government at pleasure involves a governmental subject, about which there can be no irrepealable law. An injunction was sought to prevent the removal of a county seat, on the ground that the citizens had secured a vested right therein, which a removal would violate. The case came before the Supreme Court of the United States. That court, speaking through Mr. Justice Swayne, after announcing the principle that one legislature could not bind another as to subjects of a governmental character, illustrated the proposition in this language: "If a state capital were sought to be removed, under the circumstances of this case with respect to the county seat, whatever the public exigencies, or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity, and a perpetual injunction. . . . A proposition leading to such consequences must be unsound. The parent and the offspring are alike." *Newton v. Mahoning County Comrs.* 100 U. S. 560, 25 L. ed. 711. The claim that property owners will be entitled to compensation in case of a removal is not involved in this proceeding. The power to remove the seat of government does not depend upon the right to compensation. On that question it would be improper for us to express an opinion in advance.

4. Another ground upon which the resolution is claimed to be invalid is that it was not read on three different days in each House of the general assembly, and did not, in other respects, take the course required by the Constitution in ordinary legislation. The provision for adopting resolutions proposing amendments is distinct from and independent of all provisions which are provided for the government of legislative proceedings. The provisions are in themselves complete, and are not *in pari materia* with those required in the passage of a bill. The general assembly, in proposing amendments, does not, strictly speaking, exercise ordinary legislative power. It acts in behalf of the people of the state, under an express and independent power. The mode of its exercise is prescribed, and must be observed, but the assembly is not required to look outside its power of attorney to ascertain its duty. It is only required, and it is therefore only necessary, that the vote be taken by yeas and nays, and entered in full on the journals. That this was done is not disputed.

We are of the opinion that the proposed amendment, if adopted by the people in the manner prescribed by the Constitution, would be effectual as a part of the organic law of the state. We have not discussed the question whether the remedy by injunction is, in any event, available for the purposes contemplated in this case, because defendant has expressly waived that question, and requested a decision on the broader grounds, which we have accordingly considered.

The judgment of the Circuit Court is reversed.

Brace, Ch. J., and **Sherwood** and **Robinson**, JJ., concur. **Barclay**, J., concurs in the judgment for the reasons stated in paragraphs 1 and 4. **Gantt** and **Burgess**, JJ., do not sit.

VIRGINIA SUPREME COURT OF APPEALS.

Ex parte Richard M. LACY.

(.....Va.....)

1. **Pool selling is the only form of betting or wager that is punishable** by statute which prohibits bets and wagers of all kinds but the title of which is "An Act to Prevent Pool Selling and so forth."
2. **More than one object is not embraced in a statute** which makes it unlawful to make any bet or wager, or receive, record, register, or forward anything of value to be bet or wagered upon a trial of speed or endurance of any beast, to take place beyond the limits of the state, or to assist in so doing, although the title is "An Act to Prevent Pool Selling and so forth."
3. **The words "and so forth" in the title of a statute** cannot supply an omission when the title is less comprehensive than the body of the statute.
4. **A statute making it unlawful to make or record a bet** upon any race between animals in another state is a proper exercise of the police power of the state, and not an unlawful interference with interstate commerce.
5. **Forwarding money by telegraph to another state** to be wagered on a horse race to take place in a third state may be made a criminal offense in the state from which the money is sent, although it is lawful to make such wagers in the state in which the wager is made.
6. **A prisoner committed by a justice of the peace** for trial by the county court on the charge of a misdemeanor which is exclusively within the jurisdiction of the justice is entitled to release by habeas corpus.

(April 29, 1896.)

PETITION for a writ of habeas corpus to procure petitioner's discharge from the custody of the sheriff of Alexandria County to which he had been committed for alleged violation of the statute against pool selling. *Petitioner discharged.*

The facts are stated in the opinion.

NOTE.—For *note* on the subject of the locality of crime committed through the agency of the mails or of carriers, see State v. Hudson (Mont.) 19 L. R. A. 775.

See also 33 L. R. A. 221; 36 L. R. A. 81; 37 L. R. A. 227; 40 L. R. A. 607.

Messers. **R. Walton Moore** and **Samuel G. Brent,** for petitioner.

The act of the general assembly of Virginia is in violation of Va. Const. art. 5, § 15, which declares that "no law shall embrace more than one object, which shall be expressed in its title."

If the statute embraces more than one subject it is void, whether or not the subject is expressed in its title. Thomp. Corp. §§ 607, 608.

Although a statute may embrace but one subject, it is still void if that subject be not expressed in its title.

Anderson v. *Com.* 18 Gratt. 295; *Crawford* v. *Halsted,* 20 Gratt. 211; *Henrico County Supers.* v. *McGruder,* 84 Va. 828; *Fidelity Ins. T. & S. D. Co.* v. *Shenandoah Valley R. Co.* 86 Va. 1; *Powell* v. *Brunswick County Supers.* 88 Va. 707; *Lescallett* v. *Com.* 89 Va. 878; *Ingles* v. *Straus,* 91 Va. 209; *Com.* v. *Brown,* 91 Va. 762, 28 L. R. A. 110; *Cahoon* v. *Iron Gate Land & I. Co.* (Va.) 23 S. E. 767.

The act makes it unlawful to bet or wager or to forward the money, thing, or consideration to be bet or wagered, upon the result of trials of speed taking place without the limits of the commonwealth. The title expresses the purpose or the object to be to prevent pool selling upon the result of trials of speed. Pool selling, which is the object expressed in the title, is not mentioned in the body of the act. At most pool selling is one particular kind of betting, and there are numberless modes of betting that do not resemble it in any way and must be pointed out by other language.

Com. v. *Ferry,* 146 Mass. 203.

The words "and so forth" must be confined to pool selling, and could not embrace any other mode of betting or wagering.

Cooley, Const. Lim. *55; *Fishkill* v. *Fishkill & B. Pl. Road Co.* 22 Barb. 634; *Ryerson* v. *Utley,* 16 Mich. 270; *Mewherter* v. *Price,* 11 Ind. 199; *St. Louis* v. *Tiefel,* 42 Mo. 578; *State Hackett,* 5 La. Ann. 91; *Dano* v. *M. O. & R. R. Co.* 27 Ark. 565; *Myers* v. *Dunn,* 49 Conn. 76; *Smith* v. *Walker,* 98 Pa. 140.

Petitioner's detention is unlawful unless the process, *i. e.,* the warrant, is a justification of the officer.

4 Bacon, Abr. *Habeas Corpus.*

If it appear by the return of the writ that the party be wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged.

Ex parte Rollin, 80 Va. 314.

Messrs. **Francis L. Smith** and **Edmund Burke,** also for petitioner:

In such an act the title would not disclose the object of the law, but would be a cloak under which there would be concealed and hidden the real object of the enactment.

Com. v. *Brown,* 91 Va. 762, 28 L. R. A. 110.

If the title omits all reference to the main subject of the bill, it cannot give validity to the subject-matter thus ignored.

Rogers v. *Manufacturers' Imp. Co.* 109 Pa. 109.

The title and the body of the act above quoted have no relation either to the other.

State v. *Shaw;* 39 Minn. 153; *State* v. *Lovell,* 39 N. J. L. 458.

Inconsistent laws passed the same day nullify each other.

King v. *Justices of Middlesex,* 2 Barn. & Ad. 818.

The acts are inconsistent because chapter 539 purports to prohibit the forwarding of money, etc., to be bet or wagered from any place in the commonwealth to any and every other place, whereas chapter 545 restricts the forwarding, etc., of money, etc., to be bet or wagered to definite and specified localities, to wit, to or for any race course.

State, Atty. Gen. v. *Heidorn,* 74 Mo. 410.

Chapter 545 must be assumed to have last received the approval of the executive because of its position in the public acts of assembly, it appearing, in the order of priority, six chapters subsequent to the other act and is therefore the final expression of the legislative will. It repeals chapter 539 by implication.

United States v. *Tynen,* 78 U. S. 11 Wall. 93, 20 L. ed. 154; *Fox* v. *Com.* 16 Gratt. 1.

Chapter 539 is obnoxious to that provision of the Federal Constitution which declares that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Art. 1, § 8, subsec. 3.

The act of betting or making wagers on trials of speed of horses is not prohibited by the laws of West Virginia, and the laws of this state can have no extraterritorial operation in the absence of express compact between it and other states.

Hendricks v. *Com.* 75 Va. 934.

A statute of this state punishing betting on horse races did not apply to a case where the wager was made by telegraphic communication between a person in this state offering to make the wager and its acceptance by a person in another state.

Lescallett v. *Com.* 89 Va. 878.

The act of transmitting or forwarding money from one state to another state, to be there employed or used in a manner lawful by the laws of the latter state, is interstate commerce and cannot be regulated, restricted, or inhibited by the laws of any state.

Norfolk & W. R. Co. v. *Com.* 88 Va. 95, 13 L. R. A. 107.

Sunday laws which attempt to interfere with a company transacting interstate business on that day are void.

Adams Exp. Co. v. *Board of Police,* 65 How. Pr. 72; *Corey* v. *Long,* 12 Abb. Pr. N. S. 439.

A statute of the state of Iowa making it a criminal offense to import malt or spirituous liquors into that state was unconstitutional and void.

Almy v. *California,* 65 U. S. 24 How. 169, 16 L. ed. 644; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Leisy* v. *Hardin,* 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Re Rahrer,* 140 U. S. 539, 35 L. ed. 575.

A statute passed in the exercise of the police power of a state prohibiting transportation of game killed in the state to another state was unconstitutional because an unwarranted interference with commerce.

State v. *Saunders,* 19 Kan. 127, 27 Am. Rep. 98.

The state was even powerless to tax the tele-

graphic message which petitioner was about to send.

Western U. Teleg. Co. v. *Texas*, 105 U. S. 466, 26 L. ed. 1069.

The act under discussion is in conflict with U. S. Const. 14th Amend. § 1.

Re Converse, 137 U. S. 631, 34 L. ed. 799; *Moore* v. *Missouri*, 159 U. S. 673, 40 L. ed. 301; *Baker* v. *Portland*, 5 Sawy. 566; *Re Parrott*, 6 Sawy. 349; *Ah Kow* v. *Nunan*, 5 Sawy. 552; *State* v. *Williams*, 32 S. C. 123; *People* v. *Gillson*, 109 N. Y. 389.

Mr. **R. Taylor Scott,** Attorney General, *contra.*

Keith, P., delivered the opinion of the court:

This is a petition for a writ of habeas corpus, addressed to this court by Richard M. Lacy, who alleges that he is detained without lawful authority, and deprived of his liberty by one William H. Palmer, sheriff, and *ex officio* jailer of the county of Alexandria.

It seems that he was committed to the custody of a sheriff by virtue of a warrant, dated the 31st day of March, 1896, charged with violating an act of the legislature, approved February 29, 1896, which declares it to be "unlawful for any person or persons, or association of persons, corporation, or corporations, by any ways, means, or devices, to make any bet or wager, or receive or record or register, or forward or purport or pretend to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance or skill of animals or beasts which is to take place beyond the limits of this commonwealth, or by any ways, means, or devices to aid, assist, or abet in the making of any bet or wager, or the receiving, recording, or registering, or forwarding, or purporting, or pretending to forward any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance or skill of animals or beasts which is to take place beyond the limits of this commonwealth, or to aid or assist or abet in any way or in any manner in any of the acts forbidden by this act.

"That any person or persons or association of persons or corporation or corporations violating the provisions of this act shall be fined not less than $200 nor more than $500, and be imprisoned not less than thirty, nor more than ninety, days."

The warrant of arrest does not charge the defendant with having done any of the specific acts which the statute just quoted makes unlawful, but avers in general terms that the defendant with others named in the said warrant, was guilty of each and all of the acts forbidden therein, and the commitment commands the sheriff to deliver Richard M. Lacy to the custody of the jailer of the county of Alexandria, to answer an indictment for the offense thus described at the September term of the county court of Alexandria.

The petitioner claims that this statute is repugnant to art. 5, § 15 of the Constitution of Virginia; that it is repugnant to art. 1, § 8, cl. 3, of the Constitution of the United States; that it is inoperative because two laws received the signature of the governor upon the same day, which are inconsistent the one with the other, and as there is no means of determining which of the two is the last expression of the legislative will, that neither can be operative, the one repealing the other by necessary implication; that the warrant in this case is void, because it is vague and indefinite, and does not with sufficient certainty recite the offense with which the petitioner is charged, as required by § 3956 of the Code; and, finally, that the commitment is a nullity, because by § 4106 of the Code, as amended by acts of the general assembly of Virginia, approved March 5, 1896, it was the duty of the justice to try the prisoner for the offense with which he was charged, instead of committing him for trial by the county court.

The office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner. The only issue which it presents is whether or not the prisoner is restrained of his liberty by due process of law.

A person held under proper process to answer for an offense created by a statute enacted within the constitutional power of the legislature cannot be discharged upon a writ of habeas corpus, however clear his innocence may be, but must abide his trial in the mode prescribed by law.

Is the statute under consideration repugnant to the Constitution of the state? Article 5, § 15, of the Constitution declares "that no law shall embrace more than one object, which shall be expressed in its title." This section has been recently construed by this court, which ruled that it was intended to forbid the use of deceptive titles as a cover for vicious legislation; to prevent bringing together in one bill subjects diverse and dissimilar in their nature and having no necessary connection with each other, and to avoid surprise in matters of which the title gave no intimation. See *Com.* v. *Brown*, 91 Va. 762, 28 L. R. A. 110; *Ingles* v. *Straus*, 91 Va. 209.

The title of the act in question is as follows: "An Act to Prevent Pool Selling, and so forth, upon the Results of Any Trials of Speed of Any Animals or Beasts Taking Place without the Limits of the Commonwealth."

A pool is defined by the Century Dictionary to be any horse racing, ball games, etc., "the combination of a number of persons, each staking a sum of money on the success of a horse in a race, the contestant in a game, etc., the money to be divided among the successful betters, according to the amount put in by each." It is therefore one of the forms of making bets or wagers upon horse races, while the statute makes "unlawful a bet or wager by any ways, means or devices, or the receiving, or recording or registering, or forwarding, or purporting, or pretending to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance or skill of animals or beasts which is to take place beyond the limits of the commonwealth." Without quoting further from the act, which is set out in full in the warrant, it sufficiently appears that it is far broader and more comprehensive than its title. It may be said to embrace the genus, while the title only sets out a particular species. The act makes unlawful almost every conceivable form of mak-

ing bets or wagers upon the results of trials of speed of horses, while the title only mentions the particular form of wager or bet known as a "pool" or "pool selling."

Cooley, in his work on Constitutional Limitations, speaking of the effect of such a constitutional provision as that under consideration, where the act is broader than the title, says: "In such a case it may happen that one part of it can stand, because indicated by the title; while as to the objects not indicated by the title, it must fail."

We do not consider the act as obnoxious to that part of the clause of the Constitution just quoted, which says that "no law shall embrace more than one object." The object of this law is the suppression of gambling, or that form of gambling where the bet or wager is made upon the speed or endurance or skill of animals or beasts, for as was said in *Ingles* v. *Straus*, *supra*, "if the subjects embraced by the act, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate or germane thereto, the requirement of the Constitution . . . is satisfied." Were the title sufficiently broad to cover the objects declared in the bill, there would be, in our judgment, no repugnancy to the constitutional provision in question, because all the provisions of the act may fairly be regarded as in furtherance of a single object, "the suppression of gambling." The Constitution, moreover, is to be construed so as to uphold the law if practicable. All that is required by the constitutional provision is that the subjects embraced in the statute, but not specified in the title, shall be congruous, and have natural connection with, or be germane to, the subject expressed in the title. *Com.* v. *Brown*, *supra*.

There is no such incongruity of objects and purposes in the statute as to render it obnoxious to the clause under consideration. The act, however, is far broader than the title, and can therefore only be operative as to that part of it which is indicated by its title. In other words, the only offense which can be punished by virtue of this statute is the particular form of making a bet or wager known as "pool selling."

It is claimed upon behalf of the commonwealth that the defect is cured by the use of the words, "and so forth," but in this view we cannot concur. The provision of the Constitution is mandatory. We think it is a wise and salutary provision, but whether it be or not, it is the law of the land, and must be obeyed. To hold that the legislature could, by the use of such a phrase as "and so forth," supply an omission and cure an otherwise defective title, would be to fritter away the constitutional provision, and render it illusive and nugatory. See Cooley on Constitutional Limitations, 6th ed. p. 174. These words express nothing and amount to nothing as a compliance with this constitutional requirement. Nothing which the act would not embrace without them can be brought in with their aid. *Fishkill* v. *Fishkill & B. Pl. Road Co.* 22 Barb. 634; *Johnston* v. *Spicer*, 107 N. Y. 185.

We are of opinion, therefore, that while the body of the act is broader than its title, and the title is not aided by the introduction of the phrase just discussed, the statute is not wholly inoperative for repugnancy to the Constitution of the state, but is a valid law so far as it makes pool selling an offense, and prescribes the punishment for it.

I will now proceed to consider the alleged repugnancy of the act in question to art. 1, cl. 3, § 8, of the Constitution of the United States, which declares that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes. In discussing this branch of the case, I shall treat the subject as though the prisoner were charged specifically with the offense of selling in Virginia a pool upon a trial of speed of horses to take place in St. Louis, as he can under the statute be found guilty of none other.

It is conceded that the power thus conferred is, when exercised by Congress, exclusive in its operation. It is conceded that the abstention on the part of Congress from passing laws in the exercise of its power to regulate commerce is equivalent to an expression of its will that in those respects in which it can be reached and controlled by regulations of a general character it shall remain free. On the other hand, there is a reserve of power and duty in the states, the due exercise of which is essential to the maintenance of order, the preservation of health, and the promotion of good morals; in fact, almost the whole of the great body of municipal law which establishes and enforces the duties of citizens to each other is embraced within and known as the police power. In it is to be found, says Blackstone (4 Com. 162), the "due regulation and domestic order of the kingdom whereby the inhabitants of a state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good morals, and to be decent, industrious, and inoffensive in their respective stations." The professed object of all government is to promote the general welfare, and it cannot be denied that the subjects enumerated in the above extracts are of prime importance, not only to the welfare and happiness of men, but are essential to their very existence in a state of civilized society.

The object of the law is the suppression of gambling in its most attractive, seductive, and therefore the most dangerous of its many forms. That gaming is a vice which it is the right and duty of a state to forbid under severe penalties is recognized, I think, by the Codes of every state in the Union, if not, indeed, by those of all civilized communities.

"The right to legislate upon the subject of intoxicating liquors is acknowledged by every one, and is founded upon the fact that their use in excessive quantities leads, in large masses of cases, to crime, poverty and enormous suffering, and bears most harmfully upon the sum of the happiness of the human race. So in regard to lotteries in general. A widespread custom of indulgence in the purchase of tickets leads, among the poorer classes certainly, and also among others, to habits of recklessness, waste, and idleness; it cultivates a gambling spirit, and tends to a hatred of honest labor,

and to a desire to obtain riches or money without the necessary expenditure of industrious energy." *People* v. *Gillson*, 109 N. Y. 404.

The act in question would seem, then, to be in the performance of the obligation which rests upon the general assembly of Virginia to pass laws to suppress a recognized vice. There is no question that the police power must be exercised in subordination to the Constitution of the state, and *a fortiori* that it must not be in contravention of the Constitution of the United States. Now, as the proper discharge of the functions and duties entrusted to the national and state governments is necessary to the highest efficiency of both, it follows that in the development and growth of the two systems thus blended and interwoven and operating directly, each by its own force, upon the same individuals, wisdom and prudence must prevail in order that the happiest and best results may be achieved.

In the case before us there would seem to be no reason why any antagonism or conflict should result from the exercise within their appointed limits of the power on the part of Congress to regulate commerce among the states and the duty of the state to suppress a recognized offense against good morals. There can be none unless the transmission of money or other thing of value to be bet on a race to take place beyond the limits of the state be a subject of commerce which is entitled to shelter itself under the ægis of the Constitution of the United States, and to invoke for its protection the power to regulate commerce with which Congress was clothed to the end that legitimate intercourse between the states might forever remain free and unfettered.

In *Cohens* v. *Virginia* (a case, by the way, in which a lottery established by the Congress of the United States sought to set at naught a law of the state of Virginia, which forbade the sale of lottery tickets within her borders), it was said by Chief Justice Marshall: "To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately and the intention would be clearly and unequivocally expressed." 19 U. S. 6 Wheat. 443, 5 L. ed. 300.

The same spirit happily still animates the Supreme Court of the United States. It fully recognizes the difficulty often-times presented of securing harmonious operation to the just and necessary powers of the Federal and state government, and with none of the provisions of the Federal Constitution is there more frequent opportunity for interference and conflict than under the commerce clause of the one and the police power of the other. The great truth must be recognized that the government of our people in its entirety consists of an "indissoluble union of indestructible states," and that as a consequence it is as much the duty of every department of the government of the United States to preserve in their full and unimpaired vigor those powers which, in the distribution of governmental functions, were reserved to the states as to cherish and foster the growth and expansion to their conditions of highest usefulness those functions and duties which were confided to the Federal government. Though the power of Congress is held to be exclusive in its nature, and to embrace not only the subjects of commerce, but all the agencies and instrumentalities by which that commerce is to be carried on, we find the supreme court readily conceding, in a number of instances, the free exercise of the police power of the state, though incidentally it might have the effect of interfering with, or to some extent regulating interstate commerce. For instances of this sort see cases cited in *Richmond & A. R. Co.* v. *R. A. Patterson Tobacco Co.* (Va.) 24 S. E. 261, decided at this term, and *Com.* v. *Myers* (Va.) *ante*, 379, at the January term of this court. In the latter case it is said that "the right of the state to impose a license tax upon peddlers, where it operates uniformly upon all citizens, and does not discriminate in favor of citizens of Virginia as against citizens of other states, or where the tax imposed is in the exercise of the police power, and is not a regulation of commerce under cover of that power, although incidentally it may have that effect, has been uniformly maintained; but where any injurious discrimination is discovered in favor of the resident as against the nonresident, or with respect to the sales of articles manufactured in this state over similar articles manufactured abroad, the state laws are declared to be void, as repugnant to the Constitution of the United States."

Since that case was decided I have further investigated the authorities on the subject, and I am strengthened in the conviction that no decision of the Supreme Court of the United States can be found holding a state law invalid as being repugnant to the commerce clause of the Constitution which was enacted in the bona fide exercise of the police power of the state for the suppression of a recognized vice, or to prevent the sale of adulterated food, or the manufacture of food from impure materials, or to prevent the spread of disease among men or beasts. Under cover of the police power, efforts are constantly being made to promote some unlawful purpose, as in *People* v. *Gillson*, 109 N. Y. 403, where a law was held unconstitutional which, under the police power, undertook to forbid what was held to be an innocent act, and one which the legislature could not make criminal. The supreme court has held state laws to be void which impose tonnage duties—*Inman S. S. Co.* v. *Tinker*, 94 U. S. 238, 24 L. ed. 118—and taxes on imports as in *Almy* v. *California*, 65 U. S. 24 How. 169, 16 L. ed. 644, and inspection laws discriminating in favor of the citizens of the state as against citizens of other states, *Voight* v. *Wright*, 141 U. S. 63, 35 L. ed. 638, or which in some of a great variety of modes endeavored to give to its own citizens, or to its own products, an advantage over the citizens or products of other states; and in some instances to favor one industry engaged in by its own citizens over an innocent but less favored occupation. An example of the latter is to be found in the case of *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34. Not unfrequently it

happens that the police power is resorted to merely for purposes of revenue. In these and like cases, which might be greatly multiplied, the courts have held that they did not come properly within its domain.

While a state law which operates as a regulation of interstate commerce, or which affects it except incidentally, could not be upheld under the police power of the state, while laws pretending or purporting to be in the exercise of the police power, but which are but devices and schemes under cover of that power to accomplish some purpose forbidden to the state are void, yet state laws passed with the honest purpose of promoting the health, the morals, or the wellbeing of its citizens, are valid.

Contracts are peculiarly under the protection of the Constitution of the United States, which declares that no state shall pass a law impairing their obligation; and yet it is not pretended that a state may not prohibit the enforcement of contracts resting upon a vicious or immoral consideration, the enforcement of which would have a vicious and immoral influence. So, too, we think that to call into activity the inhibition upon the states to interfere with interstate commerce implied from the grant to Congress of the exclusive power to regulate it, the first thing to be shown is some subject of commerce which commends itself as at least not injurious to health or morals. In no case can the just and proper exercise of the police power of the state, acting with the honest purpose to protect the health and morals of a community, conflict with the proper exercise of the power in Congress to regulate commerce, unless the means of disseminating disease and encouraging vice are proper subjects of commerce.

It is insisted here, however, that inasmuch as the offense consists in forwarding a sum of money by telegraph to Wheeling, W. Va., to be wagered on a trial of speed of horses to take place in St. Louis, Mo., it not being unlawful, as it is claimed, to make such a wager in West Virginia, the act making it criminal is void, not only as being repugnant to the commerce clause of the Constitution, but as an attempt to punish the doing in West Virginia of an act lawful in that state.

We have said enough to show that there is, in our opinion, no repugnancy in the statute to the commerce clause of the Constitution. Upon the other point, we might content ourselves with observing, that, as we are not trying the issue of guilty or not guilty, but only whether there is lawful cause for the detention of petitioner disclosed by the warrant and commitment, the effect of the proof of the law of West Virginia, as of all other facts, must be postponed till the trial, but as an expression of opinion has been sought, and there can be no impropriety in giving it, we are willing to go somewhat into this branch of the subject also.

We do not perceive that the fact that the race upon which the wager is to be made is to be run in Missouri, and that the money is to be placed in West Virginia at all affects the question. It remains that by the statute the act is made unlawful here, and may be punished unless it be under the protection of the Constitution of the United States. With the laws of our sister states we have no concern, except in so far as they appear in this record, and they are not the proper subject of animadversion or criticism. If West Virginia has not legislated against this form of gambling, it is no concern of ours. Virginia has a right to repress and punish that which by the common consent of mankind is a vice, without regard to the laws of other states. To make a bet or wager upon a race to take place in Missouri is as injurious to good morals as though it were to take place within our own borders; nor is the quality or character of the act at all affected by the fact that a stage in the transaction takes place upon the neutral ground of West Virginia. The root of the evil is here, and here its baneful influence and example are felt. The act at which the punishment is aimed takes place in Virginia, and over it and the actors in it Virginia has complete jurisdiction, unless, as has been so often said, shelter and protection are found under the commerce clause of the Constitution of the United States.

Another objection taken to the warrant is that it is too vague and indefinite; that it is the right of a person accused of crime to be informed of the "cause and nature of the accusation against him."

Warrants of arrest are required to recite the offense charged, but the same particularity is not expected or required as in indictments or more formal papers. See 3 Rob. Pr., old ed. p. 10; Bishop, Crim. Proc. § 714.

While we think it would be better practice to state the offense more specifically than has been done here, we are not prepared to say that we would on that account alone be content to quash the proceedings and to discharge the prisoner.

The remaining ground of objection, however, is fatal to the warrant of commitment under which the prisoner is held. By § 4106 of the Code, as amended by an act approved March 6, 1896, justices of the peace are given "exclusive original jurisdiction of all misdemeanors occurring within their jurisdiction," and are authorized to inflict the same punishments theretofore imposed by county and corporation courts. By § 4107 an unrestricted right of appeal to the county or corporation court is secured where the accused can demand a jury, but the trial and judgment must in the first instance be before the justice. The effect of this statute is to take away from county and corporation courts the power to try misdemeanors as courts of original jurisdiction. It takes away their power to try misdemeanors, even in those cases where indictments or informations were pending. See *Dulin* v. *Lillard*, 91 Va. 718, where the effect of a similar statute is fully discussed and considered, and the authorities bearing upon it are collated.

For the foregoing reasons, we are of opinion, first, that on account of the insufficiency of the title of the act under consideration pool selling is the only form of bet or wager that is made punishable; secondly, that there is no repeal by implication, but the two acts of March 5, 1896, are in full force and effect, except as hereinbefore stated; thirdly, that the act under which the warrant in this case was issued is not repugnant to the Constitution of the United States; fourth, that it would be better practice to state the offense with more precision than

has been here observed,—especially in view of the fact that justices are now clothed with exclusive original jurisdiction to try misdemeanors, and the warrant gives to the accused the only information as to the nature of the offense with which he is charged; and, lastly, that the warrant of commitment under which the petitioner is held in custody is void, because it was the duty of the justice to try the case, instead of committing the prisoner for trial by the county court, which is without authority as a court of original jurisdiction as to misdemeanors.

The prisoner must be discharged.

COLORADO SUPREME COURT.

Torrence WHITE, *Plff. in Err.*,
v.
FARMERS' HIGHLINE CANAL & RESERVOIR COMPANY.

(.....Colo.....)

1. **A canal used for the carriage of water** for hire is affected by a public interest and subject to legislative regulation in respect to the distribution of the water.

2. **A contract giving a consumer of water the right to draw and take from a canal all he may be entitled to** on tender or payment of the amount due therefor, if the owner of the canal fail or refuse to comply with the contract, is not protected against legislative interference made by a subsequent statute prohibiting such acts and regulating the distribution of water from such canals, but giving a remedy for the enforcement of the right to receive all the water to which the contract entitles him.

(January 15, 1896.)

ERROR to the Court of Appeals to review a judgment reversing a judgment of the District Court for Jefferson County in favor of defendant in an action brought to enjoin defendant from drawing water from an irrigating ditch. *Affirmed.*

Statement by **Hayt**, Ch. J.:

This action was originally commenced by the Farmers' Highline Canal & Reservoir Company, as plaintiff, against Torrence White. It appears from the undenied allegations of the complaint that the plaintiff is a corporation organized and existing under the laws of the state of Colorado for the purpose of owning, operating, and maintaining an irrigating ditch, together with reservoirs, etc.; that said company was organized on the 3d day of December, 1885, and from and after its organization it has diverted a large amount of water from one of the public streams of the state known as "Clear Creek." This water has been principally used by farmers for agricultural purposes, it being the custom of the ditch company to carry water for hire for the defendant and a large number of agriculturists along the line of the ditch. It is alleged that the defendant is entitled to 45 inches of water, and no more. Notwithstanding such fact, it is averred that the defendant demanded 120 inches of water. The company, averring its inability to comply with this demand, refused to supply the defendant with the same, or any part thereof in excess of 45 inches. Thereupon the defendant enlarged the opening in the box through which the water in his ditch flowed to his land, and wrongfully took from the canal 75 inches of water for his individual use in excess of the 45 inches which he was entitled to. It is further alleged that the taking of this additional amount of water was at the expense and damage of many consumers of water from plaintiff's ditch. It is also averred that the plaintiff company had in its employ an efficient and capable superintendent, whose duty it was to fix and adjust the various boxes through which water is supplied to the various lands receiving water from the said ditch; that this superintendent, in the discharge of his duties, apportioned the water strictly and properly according to the amounts to which each consumer was entitled. It is further alleged that, notwithstanding this fact, the defendant, after enlarging the capacity of the box or headgate used to supply his lateral ditch with water, continued to divert 120 inches of water. It is further averred that numerous other persons, tempted and led thereto by the evil example of the defendant, desiring to procure water for the irrigation of their lands in excess of the amount possible for the plaintiff to furnish threatened to follow the example of the defendant and at their will and pleasure take from said ditch various amounts of water, without consultation with the said superintendent, and against his opposition and remonstrance. Plaintiff seeks for injunctive relief restraining the defendant from taking from plaintiff's ditch water in excess of 45 cubic inches. Upon the filing of this complaint a temporary writ of injunction was issued in accordance with the prayer thereof. Afterwards the defendant filed his answer. It is unnecessary to set forth this answer in detail. It suffices to say that by it the defendant claims the right to take the additional 75 inches of water from plaintiff's ditch by virtue of a contract made with plaintiff's grantors on the 22d day of March, 1873, and duly recorded. This contract is fully set out in the opinion of the court of appeals. See *Farmer's Highline Canal & R. Co.* v. *White*, 5 Colo. App. 1. The answer also avers that the full amount of 120 inches of water was necessary to properly

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NOTE—On the question of the remedy as part of the obligation of a contract, see numerous authorities collected in *note* to Best v. Baumgardner (Pa.) 1 L. R. A. 356, and others in *note* to Phinney v. Phinney (Me.) 4 L. R. A. 348. The question is further discussed very elaborately in Beverly v. Barnitz (Kan.) *ante*, 74, the decision in which is reversed in 163 U. S. 118, 41 L. ed. —, by the Supreme Court of the United States.

irrigate the defendant's lands described in the schedule annexed to this contract, and that previous to taking the same he had tendered to the plaintiff $120 in cash for this water, this being in full payment for 120 inches of water at the rate fixed in the contract. Upon the filing of this answer the defendant filed a motion to dissolve the injunction, and about the same time also plaintiff filed a general demurrer to the answer. Whether or not the demurrer was filed before or after the dissolution of the injunction, as hereinafter set forth, does not definitely appear from the record. The record shows that after the coming in of the answer the case was heard upon the pleadings and evidence introduced by both parties. This hearing was had before the district judge at chambers, in vacation. Some months thereafter, the cause coming on to be heard before the district court in term time, the demurrer to the answer was overruled, and, the plaintiff electing to stand by the demurrer, the answer was taken as confessed, and judgment entered for the defendant. From this judgment an appeal was taken to the court of appeals. A hearing in that court resulted in a reversal of the judgment of the district court, whereupon White sued out a writ of error, upon which the record was brought into this court.

Messrs. **A. H. De France** and **A. J. Rising** for plaintiff in error.

Messrs. **Osborn & Taylor** for defendant in error.

Hayt, Ch. J., delivered the opinion of the court:

The order dissolving the temporary injunction, being merely interlocutory, is not before this court for review, except as the result was repeated in the final judgment. So, likewise, the evidence taken upon the hearing at chambers in vacation is not open to review upon appeal or writ of error. When the case was regularly reached in the district court for final hearing and determination, that court was at liberty to, and did, as the record discloses, proceed to final judgment unembarrassed by its previous order. At this hearing a general demurrer was overruled to the answer, the court thereby deciding that the pleading constituted a good and valid defense to plaintiff's complaint. In this state of the record the cause must be reviewed solely upon the pleadings. The defendant, having tendered the schedule price of $1 per acre for water for 120 acres of the lands embraced within the contract and described in the schedule annexed thereto, insists, as the water is necessary for the cultivation of his lands, that he is not only entitled to have that amount of water flow into his lateral ditch, but that he has the right to take the same, without let or hindrance from the ditch company, its superintendent, or any other water consumer. This right to actually divert water from the main canal in opposition to the will and against the protest of the plaintiff company and its superintendent is based upon the following provision of the written contract, set up in the defendant's answer: "That if the said ditch company, or the party of the second part, their assigns or successors, or whomsoever may be in control or management of the said ditch, as the case may be, shall at any time wilfully or malignantly fail or refuse to comply with the terms of the indenture as to the furnishing of said water to said parties of the third part, or any or either of them, the party having right to demand and receive any part of said water for the uses aforesaid, upon payment or tender of payment at the proper time, and demand made in writing for such water, said tender or payment to be made to and said demand of the officer or agent, if any, appointed by the parties owning or managing said ditch, or, if there be no officer or agent appointed for the purpose of receiving such demand and payment, then such payment to be tendered to and demand made upon the president, secretary, treasurer, or superintendent of said ditch company, or person exercising control and management of the said ditch, it shall be lawful for the party so entitled to such water to draw from and take all such water as he may be entitled to at the time of such tender or payment, subject to payment therefor on demand made by the officer or persons authorized to receive the same." That part of this contract which attempts to give each consumer the right to determine the amount of water to which he is entitled, with permission to take the same regardless of the rights of other consumers or of the ditch company, was declared void by the court of appeals. The court bases its conclusion upon the following reasons: First. "It is a right incompatible with the right of control incident to the ownership of the property." Second. "It is against public policy, as tending to confusion and a breach of the peace 'in allowing parties to take whatever water they required,' regardless of the rights of others having the same legal right." The court, being of the opinion that this provision of the contract was void, held that the lower court erred in refusing an injunction. Without reviewing the reasons given by the court of appeals, we think its judgment must be affirmed for a safer and better reason, *viz.*, the right claimed by the consumer is a right the exercise of which is positively prohibited by the statute of this state. In 1887 the legislature passed an act entitled "An Act Regulating the Distribution of Water, the Superintendence of Canals or Ditches Used for the Purposes of Irrigation, and Providing a Penalty for the Violation thereof." Sess. Laws 1887, p. 304. The first section of this act provides at what time water shall be kept flowing in ditches. The second provides that the owners shall keep their ditches in good order and repair, and that a multiplicity of outlets shall at all times be avoided, so far as the same shall be reasonably practicable. The location of such outlets is placed under the control of the superintendent. The third section provides that it shall be the duty of those owning or controlling such canals or ditches to appoint a superintendent, whose duty it shall be to measure the water from such canal or ditch through the outlet to those entitled thereto, according to his or her *pro rata* share. Section 4 fixes a penalty in case the superintendent or other person having charge of the ditch shall wilfully neglect or refuse to deliver water, etc., as by the act provided. Section 5 provides that the water com-

missioner, his deputy, or assistant shall promptly measure the water from the stream or other sources of supply into the irrigating canals, etc. The right to the use of water in the arid region is among the most valuable property rights known to the law. Where there are a large number of consumers taking water from the same ditch, the excessive use by some may absolutely deprive others of water at times when its application to the thirsty soil is absolutely necessary to prevent the total failure of growing crops. So, also, as between different ditches, if one, in case of scarcity takes from a public stream water to which it is not entitled, it must be at the expense of others. From the very nature of the business, controversies with reference to the use of water naturally led to unseeming breaches of the peace, and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto. Authority for such regulations may properly be based upon the principle that when private property is "affected by a public interest it ceases to be *juris privati* only." That a canal used for the carriage of water for hire in this state is affected by a public interest has been recognized by the repeated decisions of this court. Says Mr. Justice Helm in the case of *Wheeler* v. *Northern Colorado Irrig. Co.* 10 Colo. 582: "Under the Constitution, as I understand it, the carrier is at least a quasi public servant or agent. It is not the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others being engaged in the business of transporting for hire water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits or emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control." Although it is difficult to define the boundaries of the police power of the state, such regulations as those prescribed by the statute under consideration are by the decisions of the highest courts declared to be within such power. In the *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, Mr. Justice Bradley referring to the *Granger Cases* [*Munn* v. *Illinois*], reported in 94 U. S. 113, 24 L. ed. 77, stated the principle as follows: "The inquiry there was as to the extent of the police power, in cases where the public interest is affected, and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." In the case of *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989, it is said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."

It is said, however, that as the contract under which the defendant claims in this case was executed prior to the passage of the act of 1887, the parties to this action are not bound by that statute; the argument of the plaintiff in error in this particular being that he has a contract right to take this water as he pleases, and that this is a property right with which the legislature cannot interfere. This argument has been advanced in many cases, but, we believe, never successfully, where, as here, it is in opposition to the police power of the state. The extent to which the police power of the state may go is well illustrated by the case of *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036. In that case, by the act approved March 8, 1867, the legislature incorporated the Northwestern Fertilzing Company, to have continued succession and existence for the term of fifty years. By the act of incorporation the company was authorized and empowered to establish and maintain "in Cook county, Illinois, at any point south of the dividing line between townships 37 and 38, chemical and other works, for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, and into other chemical products, by means of chemical, mechanical, and other processes." The company was also authorized to establish and maintain depots in the city of Chicago for the purpose of receiving and carrying off, from and out of the said city any and all offal, dead animals, and other animal matter which it might buy or own, or which might be delivered to it by the city authorities and other persons. The works of the company were located within a designated territory, at a place then swampy, and nearly uninhabited, but at the time of the suit forming a part of the village of Hyde Park. In March, 1869, the legislature passed an act revising the charter of the village of Hyde Park, and granting to it the largest powers of police and local government. In 1872 the village authorities passed the following ordinance: "No person shall transfer, carry, haul, or convey any offal, dead animals, or other offensive or unwholesome matter or material, into or through the village of Hyde Park;" fixing a penalty for the violation of this ordinance. After this time the village authorities caused the arrest of the engineer and other employees of a railway company who were engaged in carrying offal through the village to the chemical works. These men were tried and convicted for violating the ordinance, and fined $50 each, whereupon the company filed its bill in the United States court to restrain further prosecutions and for general relief. When this case reached the Supreme Court of the United States, that court, in affirming the judgment of the state courts, held, among other things, that the charter was a sufficient license until revoked; but not a contract guaranteeing that the company should for fifty years be exempt

from the police power of the state, notwithstanding its business might become a nuisance by reason of the growth of population around the place selected for its works; third, that the charter afforded the company no protection from the enforcement of the ordinance. The case of *Buffalo East Side R. Co.* v. *Buffalo Street R. Co.* 111 N. Y. 132, 2 L. R. A. 384, is directly in point upon this branch of the discussion. The contest in that case grew out of a contract between two street-railway corporations operating in the city of Buffalo. The contract provided, among other things, for the making of connections by each with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer;" each agreeing that it would charge the same rate that it was "permitted to charge by the statute in force, regulating the same on that day," and would make no changes in rates without the consent of the other party. After this contract was made, a statute was enacted making it unlawful for any street-railway company in Buffalo to charge more than 5 cents for each passenger, this being a sum less than that authorized by the statutes in force May 3, 1872. In obedience to this statute the defendant reduced its rates of fare to 5 cents, plaintiff claiming that such reduction was in violation of the contract. Upon these facts the court held that "the authority of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature, or by the provisions of contracts between individuals or corporations." As the charter under consideration in the case of *Northwestern Fertilizing Co.* v. *Hyde Park, supra*, did not exempt the corporation from the police power of the state, although the exercise of that power in the manner attempted necessarily compelled the removal of its works to another location, and as neither the charter nor the contract between the rival street-car companies in the case of *Buffalo East Side R. Co.* v. *Buffalo Street R. Co., supra*, prevented the reduction of fares by the legislature, so our act of 1887, governing the distribution of water by ditch companies carrying water for hire, is binding upon the parties to this action, notwithstanding the agreement of March 22, 1873. The authority of the legislature in the premises is now so well settled that we may well rest content with the citations of a few of the many cases in which it has been upheld. *Granger Cases, Boston Beer Co.* v. *Massachusetts, Sinking-Fund Cases, Northwestern Fertilizing Co.* v. *Hyde Park*, and *Buffalo East Side R. Co.* v. *Buffalo Street R. Co. supra; Bertholf* v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *People* v. *Budd*, 117 N. Y. 1, 5 L. R. A. 559; *Richardson* v. *Boston*, 65 U. S. 24 How. 188, 16 L. ed. 625; *Tucker* v. *Ferguson*, 89 U. S. 22 Wall. 527, 22 L. ed. 805; *West Wisconsin R. Co.* v. *Trempealeau County Supers.* 93 U. S. 595, 23 L. ed. 814. The statue does not affect the right of plaintiff in error to receive whatever water he may justly be entitled to under his contract, but where, as here, there is a controversy as to the amount of such water available for his use, he must bring his action upon the statute to determine such right, and in no event can he be allowed to ignore the company's superintendent and its reasonable regulations, and, in violation of the statute, enlarge the outlet to his lateral ditch, and take water from the company's ditch at will.

For the reasons given, the district court erred in overruling the demurrer to the defendant's answer and in refusing to reinstate the injunction upon the final hearing, and *the judgment of the Court of Appeals is accordingly affirmed.*

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *Respts.*,
v.
Simon BENDIT, Appt.

(.....Cal.....)

Signing another's name as his agent, and adding one's own initials to show agency, in the presence of the person who pays over money on the faith of such signature, is not forgery, although the claim of authority is false and may constitute some other crime.

(February 20, 1896.)

APPEAL by defendant from a judgment of the Superior Court for the City and

NOTE.—*Forgery by false assumption of authority in signing another's name as agent for him.*

The doctrine of the above case, denying that a signature of the name of another person made by one falsely assuming to be his agent and indicating the agency so that the person taking the instrument relies, not upon the signature of the person whose name the agent signs, but upon the agent's assumption of authority, is forgery, is fully sustained by the prior authorities.

One of these is that of State v. Taylor, 46 La. Ann. 1332, 25 L. R. A. 591, in which the headnote by the court says: "An apparent agent is not guilty of forgery though he had no authority in fact;" and in the opinion it says: "In fine we are persuaded, after an examination of a number of authorities, that an instrument which shows on its face that the person signed as agent of the drawer of a note cannot be the subject of forgery. The act has not one of the essentials of the crime of forgery,—a false making of an instrument apparently genuine. The falsehood, if there is falsehood, is in the agency, in assuming to act as agent, and not in forging an instrument."

In State v. Young, 46 N. H. 266, 88 Am. Dec. 212, the court says: "A man may make a statement in writing of a certain transaction, and may represent and assert ever so strongly that his statement is true, but if it should prove that by mistake he is in an error, and that his statement is entirely wrong, that could not be forgery; and suppose we go further, and admit that the statement was designedly false when made, and so made for the purpose of defrauding some one, it does not alter the case, it is no forgery." Again it says: "The writing or instrument must in itself be false, not

County of San Francisco convicting him of forgery. *Reversed.*

The facts are stated in the opinion.

Mr. **Walter S. Hinkle** for appellant.

Mr. **W. F. Fitzgerald**, Attorney General, for the People.

McFarland, J., delivered the opinion of the court:

The defendant was convicted of forgery, and appeals from the judgment and an order denying a new trial. The information charges that appellant on July 30, 1894, did unlawfully, feloniously, falsely, etc., and with intent to defraud, "make and forge a certain instrument in writing, in words and figures following, to wit:

"San Francisco, July 30, 1894. G. W. Hume & Co.—William Cluff Company, wholesale grocers and provision dealers, 18 to 22 Front St., corner Pine. Telephone 1819.

To balance	
July 23. To bill rendered	$15 50
Discount	30
	$15 20

Wm. Cluff & Co., A. B."

It further charges, in brief, that on said July 30, he wilfully, fraudulently, etc., passed the said instrument, "as true and genuine," to one J. Deming, with intent to defraud G. W. Hume and J. Deming, doing business under the firm name of G. W. Hume & Co. The instrument is admitted by appellant to be a receipt for money, although there is nothing on its face which acknowledges such receipt.

We do not deem it necessary to consider the points made by appellant that the information is insufficient, and that material errors were committed by the court in rulings upon the admissibility of evidence, for in our opinion there was no evidence sufficient to establish the crime of forgery. There was a conflict of evidence as to whether appellant was the person who did the acts testified to by the witnesses for the prosecution; but, assuming that appellant was identified as the person who did those acts, the acts themselves do not constitute the crime charged. The facts testified to were, in brief, these: The writing alleged to have been forged was sent by William Cluff & Co. to Hume & Co. the day before July 30, 1894, so that the latter might examine it, and be ready to pay when the collector of the former should call for payment. It was then simply an unreceipted account, with no name signed to it. On July 30, according to the People's testimony, appellant went to the business place of Hume & Co., and asked J. Deming, one of the partners, for the payment of this account. Deming asked him the amount, and, as he did not give the correct amount, Deming refused to pay. Appellant said there must be some mistake, and that he would see about it, and went out. Deming testified, "I naturally thought he was a collector for them." Deming afterwards went out himself, leaving Fannie A. Berry as acting cashier. Afterwards appellant returned, and Miss Berry paid him the amount of the account, and appellant receipted it, by writing, in the presence of Miss Berry, "Wm. Cluff & Co., A. B." She testified: "I saw him sign, 'William Cluff & Company, per

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genuine, a counterfeit, and not the true instrument which it purports to be." The point actually decided in this case, however, was that it was not forgery for one to make a false charge in his own book of accounts.

In respect to checks drawn by an agent and signed "per pro. The Preston Bank Co., G. T. Tully, submanager," the court says: "Even if Tully had had no authority to draw these checks, they would not, according to the English law, have constituted forgery as was held by the fifteen judges in Reg. v. White, 2 Car. & K. 404, 1 Den. C. C. 208, 2 Cox, Crim. Cas. 210, because the signature by him in his own name 'per procuration,' etc., showed on its face all that it purported to be, and was not a false making." *Re* Tully, 20 Fed. Rep. 812.

In Conner's Case, 3 City Hall Rec. 59, on an indictment for forging corporation notes signed in the name of an individual who did not appear to be authorized to do that act, the mayor advised an acquittal on the ground that the case did not fall within the statutes as to forgery because the instrument was not such that any action could be sustained thereon, even if it had been genuine.

An indorsement on a bill of the words, "Received for Chas. MacIntosh & Co., Alex. Heilbonn, No. 9 Vine street, Regent street, No. 73, Aldermanbury," on which the bill is paid to Heilbonn, is not forgery even if he had no authority to indorse for MacIntosh & Co., and even if the words "Chas. MacIntosh & Co." were an imitation of the handwriting of a member of the firm, when the rest of the indorsement was in the undisguised handwriting of Heilbonn. *Re* Heilbonn, 1 Park. Crim. Rep. 429.

A signature to a deed in the following form, "James D. Hoitt by H. H. Wilson, his attorney in fact," made by Wilson under claim of authority by power of attorney to sign the deed, is not forgery, although he had no such authority, and the deed is not a "false" "forged" deed within the meaning of Minn. Gen. Stat. chap. 96, § 2. State v. Willson, 28 Minn. 52.

One having general authority to fill out checks for his own purposes is not guilty of forgery by making such a check in excess of his authority. People v. Reinitz, 6 N. Y. Supp. 672.

Signing the name "Schouler, Baldwin, & Co." with a statement in answer to an inquiry that the members of the firm included Baldwin the signer, and a certain person named Schouler, although there is no such partnership, and though it is done with intent to defraud, does not make Baldwin liable for forgery when the party taking the instrument knows that the signature was not the personal act of Schouler, but sees Baldwin execute it and relies on his statement of authority to bind Schouler as a partner. Com. v. Baldwin, 11 Gray, 197, 71 Am. Dec. 703.

An instrument purporting to bind a county board of supervisors for the payment of a sum of money, and signed "Henry A. Mann, Treasurer," does not make Mann guilty of forgery, although he had no authority to make the instrument. Mann v. People, 15 Hun, 155.

The decision in Mann v. People, 15 Hun, 155, was affirmed by the court of appeals in 75 N. Y. 484, 31 Am. Rep. 482, in which the court declares: "One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself and is in point of fact his own act. . . . The wrong done, where such an instrument is made without authority, consists in the false assumption of authority to bind another,

A. B.' I understood him to be the collector in the employ of the William Cluff Company, who came there to collect, and was authorized to collect, the bill." It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself,—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. And there was nothing of the kind in the case at bar. There was no pretense that "Wm. Cluff & Co." was the genuine signature of that firm. It was written by appellant himself, in the presence of the party who paid the money. He added the initials "A. B." to it, and he was understood to be acting as the agent of the firm, and to have written the name "Cluff & Co." by himself as such agent. By these acts he may have committed some other crime, but he did not commit forgery. We have been referred to no authorities to the point that the signing of another's name as his agent is forgery, while there is a multitude of authorities to the contrary in text-books and adjudicated cases. "If a man accept or indorse a bill of exchange in the name of another, without his authority, it is a forgery. But if he sign it with his own name, per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely a false assumption of authority." 2 Archbold, Crim. Prac. 819. The doctrine is fully discussed, and the views hereinbefore stated declared, in *Reg.* v. *White*, 2 Car. & K. 404. In that case the defendant brought a bill to a banker as from Tomlinson. The bill was not indorsed, but the defendant said he would indorse it. The banker wrote, "Per procuration Tomlinson," beneath which the defendant signed his own name. It was held that this false assumption of authority was not forgery, as there was no false making. It has frequently been held that "the false instrument should carry on the face of it the semblance ot that for which it is counterfeited," although if is not necessary that the semblance should be exact. 2 Archbold, Crim. Prac. 866. This rule illustrates the nature of forgery. How, in the case at bar, could there be any question about "semblance?"

The American authorities are as pronounced on the subject as the English. In *Re Heilbonn*, 1 Park. Crim. Rep. 434, the court, after having referred to other cases, says: "It might not be necessary to refer to these authorities, for it is the essence of forgery that one signs the name of another to pass it off as the signature or counterfeit of that other. This cannot be when the party openly, and on the face of the paper, declares that he signs for that other. There he does not counterfeit the name of the other, nor attempt to pass the signature as the signature of that other. The offense belongs to an entirely different class of

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and not in making a counterfeit or false paper."

An insurance agent who stamped a policy ticket with a false date and issued it after the person whom it purported to insure had been accidentally killed, and did this to defraud the insurance company, although he had authority to issue such policies on live persons, was held guilty of forgery. People v. Graham, 6 Park. Crim. Rep. 135.

In the case of People v. Graham the court does not discuss the point that the agent signed his own name. It seems impossible to reconcile this decision with the others on the subject which deny that an agent's signing his own name can constitute forgery merely because he misused his authority or falsely assumed authority, unless the distinction is to be found in the fact that in People v. Graham the forgery consisted rather in a material alteration of the instrument, which was duly signed by the insurance company's officers, than a false making of an instrument.

Feigned signatures of the payees of warrants, signed to vouchers or receipts in order to obtain the warrants from the secretary of an institution, were made by the superintendent of the institution, and the warrants thereupon delivered to him by the secretary. On an application for the extradition of the superintendent on a charge of forgery it was contended on his behalf that the offense did not constitute forgery because the secretary who delivered to him the warrants knew that he was the person who signed the names of the payees to the vouchers, but the court sustained the right of extradition. Some of the judges agreed on the ground that there was some evidence of collusion between him and the secretary. Another reason considered by some of the judges was that the secretary was not the only person to be prejudiced by the act, and that the payees of the warrants did not know that their signatures were being made by the defendant. *Re* Phipps, 8 Ont. App. Rep. 77, 4 Crim. L. Mag. 865.

In England it was early established that the signature of another's name without authority, but expressed to be per procuration and with the addition of the name of the person who made the signature, did not constitute forgery. The question was involved in the case of Rex v. Maddocks, 2 Russell, Crimes, 499, but did not reach a decision because the prisoner died before the case terminated.

But it was expressly decided in Reg. v. White, 2 Car. & K. 404, 1 Den. C. C. 208, 2 Cox, C. C. 210, that it is not forgery to sign the name of another, adding the name of the signer with the words "per procuration."

So, in Rex v. Arscott, 6 Car. & P. 408, it was decided that it is not forgery to sign one's own name to a receipt for another expressing that the money is received by the signer for such other person, although he may have in fact no authority to receive it.

A false postoffice money order signed "G. Jones, *pro* postmaster," was held a criminal forgery when the name was not signed by Jones and there was in fact no such person connected with the postoffice. Reg. v. Vanderstein, 16 Cox, C. C. 177, 16 Ir. C. L. Rep. 574.

But by 24 & 25 Vict. chap. 98, § 24, it is made forgery to sign the name of another person "by procuration or otherwise" with intent to defraud, and it was so held in case of a receipt signed "P. P Susey Ambler, Wm. Kay." Reg. v. Kay, L. R. 1 C. C. 257, 39 L. J. M. C. 118, 22 L. T. N. S. 557, 18 Week. Rep. 934.

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crimes." In *Mann* v. *People*, 15 Hun, 155, the court, in an elaborate opinion, in which the authorities and the arguments for an opposite view are fully reviewed and discussed, holds that "where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, either at common law or under the statutes of this state, even though he has in fact no authority from such principal to execute the same." (We quote from the syllabus, which is a correct condensation of the opinion.) In *Com.* v. *Baldwin*, 11 Gray, 199, 71 Am. Dec. 703, the supreme judicial court of Massachusetts says: "It is not, said Sergeant Hawkins, the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. If the defendant had written upon the note, 'William Schouler by his agent, Henry W. Baldwin,' the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature." In *Com.* v. *Foster*, 114 Mass. 311, 19 Am. Rep. 353, the court says: "The falsity of the instrument consists in its purporting to be the note of some party other than the one actually making the signature. The falsity of the act consists in the intent that it shall pass and be received as the note of some other party." In *State* v. *Young*, 46 N. H. 266, 88 Am. Dec. 212, the supreme court of that state says: "To forge or to counterfeit is to falsely make, and an alteration of a writing must be falsely made to make it forgery at common law or by our statute. The term 'falsely,' as applied to making or altering a writing in order to make it forgery, has reference not to the contents, or tenor of the writing, or to the fact stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains,—a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not." In *State* v. *Wilson*, 28 Minn. 52, the court, referring approvingly to *Mann* v. *People*, *supra*, says: "The court decided that this did not constitute forgery, and held, in substance, that when one executes and issues an instrument purporting, on its face, to be executed by him as agent of a principal therein named, he is not guilty of forgery, although he has in fact no authority from such principal to execute or issue the same. In fact, we have found no authority to the contrary, and the text writers uniformly lay down or approve of the same rule." There are numerous other authorities to the same point, but further citation is unnecessary. Of course, the averment in the information that the appellant uttered and passed the said instrument "as true and genuine" is also, under the above views, unsupported by the evidence.

It is contended that the definition of "forgery" in § 470 of the Penal Code makes the crime different from forgery at common law, but, with respect to the question here under discussion, there is no such difference. At common law there were frequent embarrassing questions as to what kinds of writings were the subjects of forgery, while our Code, to avoid those questions, enumerates a very large number of writings as subjects of forgery. But as to what constitutes forgery of instruments which are subjects of forgery, the definitions at common law and by our Code are the same. "Forgery, at the common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bishop, Crim. L. 8th ed. § 523. In the notes to the section of Bishop just quoted, many other definitions are given, and it will be noticed that the leading descriptive words are "false making," or altering. In our Code the words are "every person who with intent to defraud another falsely makes, alters," etc., any of the written instruments enumerated. The definition is therefore essentially the same in both instances, and it is the same in the statutes of all the other states to which our attention has been called. But the meaning of the words "false making," when applied to forgery, is that hereinbefore stated. The broad and well-established distinction above set forth cannot be ignored by courts or jurors, even when, in their opinion, a more severe punishment should be imposed on a defendant than the one which the law prescribes for the offense of which he is guilty. As was said in *Mann* v. *People*, *supra*, "Whatever his misdeeds, he must not suffer for a crime which he has not committed." Forgery is a grave and exceedingly dangerous crime. A very large part of the business of civilized countries is done by means of negotiable instruments. These are rarely presented by the makers, but are paid to others on the faith that the signatures and the bodies of the instruments are genuine. The business of a bank would come to a standstill, if the paying teller would not pay any check until he could communicate with the drawer. Hence, if there were many successful forgeries, there would be the utmost confusion in business circles. Consequently forgery, no matter how small the amount involved, is made a felony. But obtaining money or other property by false pretenses, where the party defrauded gives credit, not to the genuineness of a writing, but to the person who deceives him, is made a misdemeanor or felony, according to the amount of money obtained by the false representation. For the foregoing reasons the judgment must be reversed, and, of course, another trial upon the theory on which the first trial was conducted would be useless.

The judgment and order appealed from are reversed.

We concur: **Temple, J.; Henshaw, J.**

INDIANA SUPREME COURT.

Allen T. LYNCH, *Appt.*,
v.
Isaac ROSENTHAL.

(.....Ind.....)

A sale of lots to be drawn by the purchasers, the advantages of location, character, size, or condition as between lots of the same class as arranged by the prices marked to be determined wholly by lot, while one prize lot is to be given to some one of the purchasers as the result of chance, is contrary to public policy and void.

(February 21, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Adams County in favor of defendant in an action brought to enforce specific performance of a contract for the purchase of real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. F. Mann, A. P. Beatty, France & Merryman,** and **Lafollette & Adair** for appellant.

Messrs. **Richard K. Erwin** and **J. R. Bobo,** for appellee:

The contract sued on is a lottery.

United States v. *Olney,* 1 Abb. (U. S.) 275; *Governors of Almshouse* v. *American Art Union,* 7 N. Y. 228; *People* v. *American Art Union,* 13 Barb. 577.

The court cannot take any cognizance of a controversy arising out of it.

Burger v. *Rice,* 3 Ind. 127; *Madison Ins. Co.* v. *Forsythe,* 2 Ind. 484; *Collier* v. *Waugh,* 64 Ind. 456; *Mullikin* v. *Davis,* 53 Ind. 206; *Rothrock* v. *Perkinson,* 61 Ind. 39; *Keivert* v. *Meyer,* 62 Ind. 587, 30 Am. Rep. 206.

The whole matter is absolutely void.

Ind. Const. art. 15, § 8; *Swain* v. *Bussell,* 10 Ind. 438; *Burger* v. *Rice, Madison Ins. Co.* v. *Forsythe,* and *Rothrock* v. *Perkinson, supra; Jones* v. *Noe,* 71 Ind. 368.

Hackney, Ch. J., delivered the opinion of the court:

This was a suit by the appellant against the appellee for specific performance of a contract for the purchase of real estate. The material features of the contract were that Lynch held a contract for the purchase of a tract of land lying adjacent to the corporation line of the city of Decatur, in Adams county, which land he was about to plat as an addition to said city, in accordance with a diagram then drawn, and made a part of the contract, exhibiting fifty-four lots. The appellee and others agreed, severally, by the express provisions of that contract, "to purchase of said first party [Lynch] the number of lots indicated by the number placed opposite" his name, "on the following conditions, to wit: The price of said lots shall be the same as shown by the annexed plat" (the prices varying according to classes and locations), "and whenever all of said lots are sold, except the six lots . . . marked 'Reserved,' . . . and the lot marked 'To be Given Away,' then said second parties shall meet, and determine by lot the number of the lot or lots to be awarded to each respective subscriber, and shall also determine, in some manner to be agreed upon by themselves, the manner of awarding the prize lot. As soon as said lots are awarded, and it is determined in whom the respective ownership shall lie, then the said Allen T. Lynch shall make out and deliver to each party a good and sufficient warranty deed for each of said lots, to each of said subscribers." It is further stipulated that one half of the purchase price for any lot shall be paid or secured when the deed is delivered, and the other half when Lynch might build and put in operation, near the lots, a furniture factory of the character therein described. There were thirty-five subscribers for one lot each, the appellee being one of that number. Each of the three paragraphs of complaint alleges subscriptions for less than the whole number of lots for sale under said contract, and the waiver by all the parties of any requirement to sell all of such lots; that all of the subscribers, including the appellee, met and determined by lot which of the platted lots should be designated for conveyance to each subscriber, including a described lot for the appellee. And it is alleged, in detail, that the appellant complied with the requirements of the contract on his part; that he executed the required deed of conveyance to the appellee, and tendered it to him, and upon his refusal to acccept it the same was brought into court for him. To the complaint the appellee filed seven answers in bar, the 3d, 4th, 5th, and 6th of which were sustained against the appellant's demurrer, and are here assigned as severally insufficient. The 3d answer pleads that all the lots agreed to be sold were not sold, and that the stipulation as to the sale thereof was not waived. This much of the answer presents the same question arising upon the 6th paragraph of answer. Counsel offer no objection to the sufficiency of either of these paragraphs in this respect, and we observe no objection to them. If all of the lots had gone into the hands of separate, bona fide purchasers, their prospective value would certainly have been greater than if but few had been sold and a large number left in the hands of a single owner. But, in addition to this feature of the 3d paragraph, it alleges that after said subscriptions were made the appellant and a number of subscribers met, and, upon the suggestion and assistance of the appellant and his attorney, certain of said fifty-four lots were awarded to the subscribers, severally, by placing the numbers of lots, severally, upon tickets, and placing them in a box, and then by placing the names of the subscribers, severally, upon tickets, and placing them in another box, whereupon two persons, who were blindfolded, drew simultaneously from the boxes a name and a number of a lot, until

NOTE.—On the question what consitutes a lottery scheme, see also People v. Elliott (Mich.) 3 L. R. A. 403, and *note*; Yellowstone Kit v. State (Ala.) 7 L. R. A. 599, and *note*; Ballock v. State (Md.) 8 L. R. A. 671, and *note*: State v. Boneil (La.) 10 L. R. A. 60, and *note*; Long v. State (Md.) 12 L. R. A. 89, and *note*, 425; State, Kellogg, v. Kansas Mercantile Asso. (Kan.) 11 L. R. A. 430.

all of the names were drawn; and in each instance the lot whose number was drawn when a name was drawn was awarded to the subscriber whose name was so drawn, and constituted the selection of the lot to be conveyed to him; that at the same time, and in the same manner, said persons awarded the prize lot to one of the subscribers,—that is to say, they placed in one box thirty-four blank tickets, and one ticket marked "Prize Lot," and in the other box tickets containing, severally, the names of the subscribers, and, as names were drawn from one box, tickets were drawn from the other, until the name of one subscriber and the ticket bearing the "Prize Lot" appeared simultaneously, when that lot was awarded to such subscriber, and was thereafter conveyed by appellant to him. The contract, and the manner of its attempted execution, are alleged to have been void as against public policy. The 4th answer alleged that the prices of the lots, as marked upon the plat, were in excess of the actual values of the lots, and that the appellant, as an inducement to persons to subscribe, offered the chance of obtaining the prize lot in addition to that subscribed for; that appellant participated in the drawing, which was described as in the 3d paragraph. The 5th answer alleged the stipulations of the contract as to the selection of the lots subscribed for, and the awarding of the prize lot; that the lots were not of the values placed upon them; and that the values of those in any class were variant, so that one person drawing a lot at a given price might obtain one of greater or less actual value than that obtained by another subscriber drawing one of the same price. Appellant's learned counsel have not discussed their objections to these answers separately, but they have attacked them collectively as not disclosing the invalidity of the contract. They will be regarded, therefore, as having waived all other questions arising upon them.

The argument is not made that contracts tainted with the vice of lottery schemes are enforceable. That such contracts are against public policy, and that those who have entered into them shall have no relief, in the courts, to enforce those that are executory, or to recover that which has passed under such as have been executed, is without doubt. Const. art. 8, § 15; *Burger* v. *Rice*, 3 Ind. 127; *Swain* v *Bussell*, 10 Ind. 438; *Rothrock* v. *Perkinson*, 61 Ind. 39; *United States* v. *Olney*, 1 Abb. (U. S.) 275, Fed. Cas. No. 15,918; *Whitney* v. *State*, 10 Ind. 404; *Crews* v. *State*, 38 Ind. 28; *Hudelson* v. *State*, 94 Ind. 426, 48 Am. Rep. 171; *Riggs* v. *Adams*, 12 Ind. 199; 13 Am. & Eng. Enc. Law, p. 1187; Rev. Stat. 1894, §§ 2170–2172 (Rev. Stat. 1881, §§ 2076–2078). The important question here is as to the character of the present contract. Does it infringe this principle of public policy? This inquiry depends upon what a lottery scheme is. In *Hudelson* v. *State*, *supra*, it was held that where a merchant, with each sale of merchandise to the value of 50 cents, gave the purchaser the right to guess as to the number of beans in a glass globe,—the nearest guesser to receive a gold watch,—the transaction was a lottery. The court there quoted with approval several definitions of a "lottery," some of which are as follows: "Whether the enterprise . . . be called a scheme of chance, a gift enterprise, or a lottery, it is still a scheme of chance, and in that sense a lottery or gift enterprise. *Lohman* v. *State*, 81 Ind. 15." "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." *Hull* v. *Ruggles*, 56 N. Y. 424. "A lottery is a scheme for the distribution of prizes by chance." *Dunn* v. *People*, 40 Ill. 465. In *Rothrock* v. *Perkinson*, *supra*, it was said: "It is well settled in this state that every scheme for the division or disposition of property or money by chance, or any game of hazard, is prohibited by law, and that every contract or agreement in aid of such a scheme is void as against public policy;" citing, in connection with some of the cases we have cited, those of *Higgins* v. *Miner*, 13 Ind. 346; *Thatcher* v. *Morris*, 11 N. Y. 437. "Lot" is defined to be "a contrivance to determine a question by chance, or without the action of man's choice or will." *Chavannah* v. *State*, 49 Ala. 396; 13 Am. & Eng. Enc. Law, p. 1181. Webster's International Dictionary defines "lot" as "anything used in determining a question by chance, or without man's choice or will." If the property subject to distribution possesses unequal values, so that one's good or ill luck in the scheme of distribution may determine whether he shall receive more or less for his investment, the scheme is a lottery. *Dunn* v. *People*, 40 Ill. 465. Nor is it less a lottery because the person whose property is distributed, or the person who pays, does not personally participate in the drawing. *Fleming* v. *Bills*, 3 Or. 286; *Riggs* v. *Adams*, *supra*.

By the definite language of the contract in this case, the lot which the appellee agreed to purchase was to be determined by lot. It was to be one of the fifty-four parcels, to be designated wholly by chance, and without the will or choice of the appellant or the appellee. Whether he was to pay $100 or $300 was a question over which he had no choice, and the appellant was without control. Any advantage in the selection—by reason of location, character, size, or condition—of a lot from any of the various classes, as arranged by the prices marked, was not to be determined by the judgment of a subscriber or the seller, but depended wholly upon the chances to be settled by "lot," as the contract provided. Distribution by chance was never more certainly contemplated and, if not so contemplated, the manner in which the appellee's alleged purchase was determined was never outrivaled as a method of chance,—not even by the guessing upon the number of beans in the globe, for in that instance the person to be benefited exercised his own judgment in determining upon a number. The method adopted was no less objectionable, as one of mere chance, than the methods of the old Louisville Library Association, or the more recent Louisiana Lottery. If there had been nothing in the contract directing the choice by lot, and the choice had been made in the manner alleged in some of the answers, every objection would prevail against it that would obtain if the appellee had been assigned a lot as the result of a game of cards, the

throwing of dice, or the turning of the roulette. In any one of these methods the result depends entirely upon chance, and excludes the exercise of the judgment. In the case of *Swain* v. *Bussell*, *supra*, this court quoted with approval from *State* v. *Clarke*, 33 N. H. 334, 66 Am. Dec. 723, "that where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery." In the present case the subscriber is to get a lot more or less valuable, depending alone upon chance; and he is to pay for it a sum, more or less, depending alone upon chance. It was further said by this court in the case mentioned, referring to *Den, Wooden*, v. *Shotwell*, 23 N. J. L. 470: "Wooden had divided a parcel of land into fifty-eight lots, of unequal value, from $50 to $600 per lot, and disposed of them at $75 each, and the particular lot of land to which each person was to receive a title was determined by lot. The supreme court of New Jersey say this was, both in form and substance, a lottery." The difference between that case and the present is merely in degree of advantage or disadvantage to the parties, in the amount to be paid, and the proportionate values to be received, as between those who make the payments. The method of distribution in either involves the objectionable feature of chance, upon which the choice of property of higher or lower value and greater or less price is determined without the exercise of the will and judgment of the parties. The manner in which the chances in this case were determined is even more objectionable. Here forty-seven lots were made the subject of choice for the selection of but thirty-five lots, and thereby added to the objection of distributing thirty-five lots by chance the further vice of placing the appellant's remaining twelve lots in the scale, and his ownership, with locations, character, and values, all depending upon the result of the drawing.

Another feature of the contract, and the manner of executing it, is in the offer and award of the "prize lot." Counsel for appellant seek to eliminate this feature of the contract, and to uphold that which remains, by insisting that this lot was a gift to all of the subscribers, without contract that it should go to any one by lot. If this were true, and the appellee was denied the benefit of that part of his contract by the appellant's conveyance to one of the subscribers in violation of the contract, we are at a loss to determine how he (the appellant) is in a position to insist upon the enforcement of a contract which he has violated and rendered impossible of complete execution. But we do not agree with this view of the contract. It is stipulated that a "prize lot" is "to be given away," and is to be "awarded" in a manner to be determined. It is not stipulated that all of the subscribers shall become the owner of this lot, nor, in fact, that any one of them shall, but when the parties came together, with the knowledge and consent, if not the direct participancy, of the appellant, the contract is construed to mean that the "prize lot" is to be awarded to some one of the subscribers, who, by the result of chance, is proved to possess the luck to have his name and the "prize lot" ticket drawn simultaneously. This construction of the contract is ratified and acted upon by the appellant in the act of conveying the lot to the lucky subscriber. This construction of the contract renders certain that doubtful part of it which omitted to stipulate the person to whom and object for which the "prize lot" was to be awarded. It was to increase the interest of a subscriber, who, by subscribing for one lot, had the chance, for the same money, to get two lots. We find, therefore, that both the contract and the manner of attempting to comply with its terms were against good morals, forbidden by public policy, and void.

Appellant insists that the lower court erred in sustaining a demurrer to his reply to these answers, in which reply he alleged that, when he tendered appellee's deed, it was declined, not because the transaction was against public policy and void, but for the reason, then stated by him, that appellant had not complied with the requirement of the contract as to the building of a factory. Authorities to the proposition that one may not assert one defense out of court, and another in court, to the prejudice of the complaining party, are cited. We do not stop to consider the true doctrine of these cases. It is enough to say that one who asks equity must present clean hands in which to receive it. Here the appellant, from the beginning, had unclean hands He originated, carried forward, and in this suit sought to enforce, a vicious contract. He is in no position to ask that equity estop his ally from exposing the vice of that contract, the enforcement of which public morals forbid. The evidence supports the judgment of the circuit court. There is no error in the record, and *the judgment is affirmed.*

TENNESSEE SUPREME COURT.

STATE of Tennessee, *Appt.*,
v.
H. S. OLD.

(95 Tenn. 723.)

A statute making it an indictable offense to vote without presenting to the judges of election an original poll-tax receipt, or a certified duplicate copy thereof, or a certificate of a constable or deputy collector, or else an affidavit of the voter, that he has paid his poll-tax and that his receipt is lost or misplaced, is within the power of the legislature, even as applied to a voter who has actually paid his poll-tax, where the Constitution requires "satisfactory evidence" of such payment and also gives the legislature

NOTE.—The general question how far there is an absolute constitutional right of voting is presented in a *note* to State, Allison, v. Blake (N. J.) 25 L. R. A. 480.

P. 837. See also 40 L. R. A. 752.

power to enact laws "to secure the freedom of elections and the purity of the ballot box."

(March 23, 1896.)

APPEAL by the State from a judgment of the Circuit Court for Wayne County quashing an indictment against the defendant for illegal voting. *Reversed.*

The facts are stated in the opinion.

Mr. **G. W. Pickle,** Attorney General for the State.

No appearance for appellee.

Snodgrass, Ch. J., delivered the opinion of the court:

Defendant was indicted in the circuit court of Wayne county for illegal voting. The charge was that, in a certain election, held on the 15th of October, 1895, in the fourth civil district of Wayne county, to elect a justice of the peace, the defendant, being over the age of twenty-one years, and having had a polltax assessed against him for the year next preceding the election, which he had paid, did unlawfully vote in said election without furnishing to the judges thereof satisfactory evidence that he had paid said poll tax, to wit, that he did not present to the judges of said election his original poll-tax receipt, or a duly certified duplicate and copy of the same, or the duly authenticated certificate of a constable or deputy collector, as required by law, nor make affidavit in writing signed by him that he had paid his polltax and that his receipt therefor was lost or misplaced. This indictment was quashed on motion of defendant, and the state appealed in error.

The correctness or incorrectness of the judgment depends upon the question whether chapter 23 of the Acts of the Extra Session of the Legislature of 1891 is or is not constitutional. There is no doubt of the application of that act, nor is there any objection to the manner of its passage. On August 7, 1891, Gov. Buchanan issued his proclamation convening the general assembly in extraordinary session. The law in controversy was included in the call, and the manner of its subsequent passage by the legislature thus convened by the governor, its regular enactment by that body, and its approval by the governor, are not questioned. It was properly passed on the 18th and approved on the 19th of September, 1891 (Acts Ex. Sess. 1891, pp. 45–48). Nor is there any question of the validity of the indictment thereunder as to form or terms. The 1st section of the act provided "that chapter 222 of the acts of the regular session, approved March 30, 1891, regulating the elective franchise [which act was itself an amendment of the act of 1890, Ex. Sess. p. 67, chap. 26], in accordance with art. 4, § 1, of the Constitution of the state, be so amended as to require that the satisfactory evidence to be furnished by the voter to the judges of the election, whether general or special, whether national, state, county, or municipal, that he has paid the poll tax contemplated by the Constitution assessed against him, if any, for the year next preceding said election, shall consist of the original poll-tax receipt or a duly certified duplicate and copy of same, or the duly authenticated certificate set out in § 8 [which provided for a trustee's certificate and its form], when said tax has been paid to a constable, and not to said trustee, properly certified by the trustee, or shall make affidavit in writing and signed by the voter that he has paid his poll tax and that his receipt is lost or misplaced, which affidavit shall be filed with the said judges and by them attached and made an exhibit to the returns of said election." The 5th section of this act provided "that any person voting, or any judge of any election permitting, knowingly, any person to vote, in the same without having first complied with the provisions of § 1 of this act [the section just quoted], shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than $50 and imprisoned in the county jail or workhouse ninety days." A reference to the indictment clearly shows that it states an offense under this act, and, if the act be valid, is clearly good. The objection of the defendant is that the act is unconstitutional, and this involves the consideration of the constitutional provisions which it is urged, on the one hand, invalidate, and, on the other, authorize, this statute. These are embodied in art. 4, § 1, of the Constitution of 1870. That section reads as follows: "Every male citizen of the age of twenty-one years, being a citizen of the United States, and a resident of this state for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers of the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election where he offers to vote satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the legislature shall prescribe, and at such time as may be prescribed by law, without which his vote cannot be received. And all male citizens of the state shall be subject to the payment of poll taxes and the performance of military duty, within such ages as may be prescribed by law. The general assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box." Independently of the conclusion of this provision, it cannot be successfully denied, and is not disputed, that the legislature would have the right to make the furnishing "satisfactory evidence" of the payment of a poll tax a prerequisite of voting, and its nonfurnishing an indictable offense; and the original act of 1890, which we have cited, confined itself to these general terms. The first amendatory act of 1891 provided that the "satisfactory evidence" should consist of the original poll-tax receipt, or a duly certified copy, or an affidavit that the voter had paid his poll tax and that his receipt was lost or misplaced. Acts 1891, p. 436. The act we are considering enumerated these, and added provision for certificate when paid to a constable,—not an enlargement, but rather an explanatory provision, covering case of such pay-

ment, which might have been of doubtful construction under the first act of 1891.

The objection made to the act is not that the legislature could not prescribe that "satisfactory evidence" should be furnished, nor is it objected that the legislature (in prescribing that such evidence should be a receipt for payment, or a certified copy, or the affidavit of the voter that he had paid the tax and had such receipt, which was lost or misplaced) was requiring evidence not satisfactory, or evidence difficult to make, or which, in any event, could exclude the voter from the exercise of his right to vote. It is obvious that to require the original alone, or either the original or copy of receipt, as the only evidence, might make voting a matter of difficulty, and, in case of loss, an impossibility; but, when to these is added the provision that the voter's own affidavit of their loss is sufficient to enable him to vote without them, it is obvious that no hindrance is imposed to his free and unobstructed right of suffrage. It cannot be denied that the original receipt was good evidence, nor, in its absence, that a certified copy is good evidence. It is only in favor of the right, however, that the legislature makes them "satisfactory," for it might be true that a voter might have either, and yet not in fact have paid the tax. So, it is true that his affidavit might be false, and still it is made evidence. In other words, the legislature has left with the voter, unhampered and unhindered, the opportunity, as well as the right, to furnish such satisfactory evidence in the kind of evidence prescribed, and, having done so, has no more nor less discharged than it was authorized to do, its constitutional duty. If, under the guise of requiring satisfactory evidence, it had acted arbitrarily, and contrary to the spirit of the Constitution, if not to its letter, its action might well have been held void; but when it adopts, even under that part of the constitutional article requiring the offering of satisfactory evidence, only the production of that evidence which all mankind would deem to be such as the voter could easiest make, and which is most naturally expected to establish the fact to be shown, it could not be held that the legislature had transcended its power under the Constitution had the first clause of § 1 of article 4 stood alone. But the clause in question does not stand alone. It was obvious to the Constitution makers that fraud and force might be attempted in our elections, as they had been everywhere else; and so it was deemed proper, though it was probably not essential (for, in the absence of restriction by the Constitution, the legislature would have possessed general power on this subject, as all others of legislative nature), to add specific power to enact laws "to secure the freedom of elections and the purity of the ballot box," thus putting its constitutional authority beyond cavil under the general terms of the Constitution as to "satisfactory evidence." But under such terms, repeated only and literally in a statutory enactment (as was the case in the act of 1890), and leaving this phrase to be construed as might best accord with the capacity, judgment, and partisan bias (where it might exist) of all the thousands of judges of elections who would thereafter have to construe and give it effect, it is clear that no greater source of oppression and impurity of the ballot box could be conceived than might be originated in diverse and improper construction and exercise of such undefined power by the judges of election. Voters might be denied the privilege of suffrage upon the most false and flimsy pretexts of the insufficiency of their evidence of payment of poll tax, and, on the other hand, might be permitted improperly to exercise it upon the most unsatisfactory, and, indeed, upon no, evidence, provided the judges of election should hold themselves satisfied with whatever was offered or with none.

The framers of the Constitution, therefore, did not intend to leave the legislature, by any restriction, powerless to prevent this result, but especially, along with this declared authority to legislate on the poll-tax provision so as to designate the time preceding election for which it should be paid and ages within which it should be paid, authorized it, on this and all other subjects, to enact such laws as would secure the freedom of elections and the purity of the ballot box. Within proper limits the legislature is the judge of what such laws should be, and it was clearly within their province to say that this was such a law. *Cook* v. *State*, 90 Tenn. 407, 13 L. R. A. 183. It is obvious, too, that it is so in fact. We have already shown that the evidence which the act declares to be satisfactory is that most naturally and most easily obtainable and to be made by the voter, and that only which ordinarily and by common consent is assumed by all to be the acceptable evidence of the fact of payment. But we have also suggested that while, for all convenient and practical purposes, it is the most available and best evidence, it is not, in fact, the best. The best evidence which could be required, perhaps, by any judge of election, would be the actual payment in his presence, by the voter, of his tax to the collector. Now, suppose, under the Constitution, the legislature had no power to prescribe what should be satisfactory evidence, and the phrase left in general terms to the judges of election for their construction and their guidance, and that some or all judges would be satisfied with no less evidence than that suggested, it is obvious that such view would be subversive practically of the right of suffrage. So other modes of proof might be demanded,—as, that the voter should produce witnesses, to prevent imposition of forged receipts on the judges, and then witnesses of the good character of these, that the judges might be thoroughly satisfied. And so illustrations might be multiplied of the various constructions which, naturally and innocently, different judges of elections might put upon these words, to say nothing of the multiplied frivolous and false constructions which extreme partisan officials might give to them, to defeat or obstruct the votes of those who should be of another political party than that of the judges. And, too, in the matter of permitting voters to cast their ballots on "satisfactory evidence" of poll-tax payment, what a diversity of construction would prevail! In one case the mere statement of the voter would be deemed satisfactory; in another, not; and so of unsworn statements of other witnesses for the voter.

And, again, because some one of the judges or others knew, or did not know, that he had voted at a former election in same year, or because he was good for the tax, he is presumed to have paid it, or, being honest, that presumption is indulged; or because somebody would say that they had heard the collector say this tax was paid, or that all poll tax of the given county was paid, hence no special evidence in the particular case is required, etc. These illustrations, too, might be multiplied indefinitely, but the ones given are sufficient to show how differently and erroneously might be construed and applied the general terms used in the Constitution if it was not permitted to be given one easy, fixed, plain, and natural limitation by the legislature; or, speaking more accurately, if the legislature was not permitted to prescribe just, plain, easily observable offerings of proof as the "satisfactory evidence" of the Constitution, and thus destroy the facility to suppress the freedom of elections, and to sully the purity of the ballot box, which lurks beneath the dangerous limits of this general phraseology.

It was not only, therefore, within the power of the legislature, but it was the duty of that body, to pass some such law as would define this evidence, and compel judges of election to accept it when offered, in all cases alike, and thus enable every voter in Tennessee to cast his free and unhindered ballot, and, at the same time, to prevent the denial to any voter, however low and humble, ignorant or illiterate, of such right, by the adoption of such method of evidence as he could get, or if he could not get, could give himself, when he went to vote, and thus make it impossible for him to be cheated out of the privilege of voting, under the constitutional provision on this question. On the general question of the validity and strict binding effects of such laws as require, not merely the existence of certain facts, but particular proof of their existence to be made, as a prerequisite to voting, there is no doubt, and we refer to a few of the authorities where the question is more elaborately considered. It is too well settled now to need argument or extended statement. Paine, Elections, § 451; Brightly, Elect. Cas. p. 452; *Re Cusick's Election*, 136 Pa. 476, 10 L. R. A. 228; Cooley, Const. Lim. p. 758; 13 Pa. Co. Ct. 544; *Re Duffy's Election*, 4 Brewst. (Pa.) 531. And that a vote cast without such prerequisite proof of fact is illegal, though the fact existed, is well recognized. Some of the cases referred to, and numerous others, cover this proposition. These are on the general subject, but the express language of our Constitution is not (merely) that the voter shall pay, but that "he shall give to the judges of election satisfactory evidence of payment, . . . without which his vote cannot be received." The statute, in pursuance of this provision, requires the giving of such satisfactory evidence, and makes the failure to do so an indictable offense.

The court makes neither the Constitution nor the law, but upon it is devolved the duty of applying them, and, so doing, we are left no alternative but to hold the indictment in this case valid.

The judgment of the Circuit Court is therefore reversed, and the case remanded for trial.

31 L. R. A.

Sims LATTA, Exr., etc., of W. H. Brown, Deceased,

v.

Mary Lou BROWN.

(.....Tenn.....)

1. **Other devisees must contribute to make up a deficit** in a devise caused by a widow's election to take dower instead of a gift under the will, where the refused share of the widow given to the disappointed devisee is not sufficient to supply the loss to such devisee.

2. **The right of remaindermen to be accelerated and immediately to enter** upon and enjoy the use of land devised subject to a widow's life estate, when she refuses to take under the will, is subject to the superior right of a disappointed devisee whose share is diminished by the widow's election to have compensation for such loss by taking the life interest which the widow refuses.

(March 7, 1898.)

APPEAL by defendants, the Alexander children, from a decree of the Chancery Court for Maury County determining the rights of beneficiaries in the will of W. H. Brown, deceased, upon his widow's electing against the will and taking some of the devised property. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Vertrees & Vertrees**, for appellants:

The interest which Mrs. Brown was given by the will may be sequestered to compensate Mrs. Taylor for the loss she has sustained by reason of Mrs. Brown's dissent and the allotment of part of her portion to Mrs. Brown as dower; but the interests of the Alexander children cannot be sequestered for that purpose.

Dower is the estate which the wife has by operation of law in the lands of her husband. *Combs* v. *Young*, 4 Yerg. 218, 26 Am. Dec. 225.

By Mill. & V. Code, § 3244, it has been restricted and limited to narrower bounds than those by which it was defined at common law, but as far as it goes it is still the same estate. This estate is one she is entitled to under the law, which no one can defeat.

Frost v. *Etheridge*, 1 Dev. L. 30; *Combs* v. *Young*, 4 Yerg. 229, 26 Am. Dec. 225.

Such, however, is not the case with respect to the widow's right in the personal estate.

Cannon v. *Apperson*, 14 Lea, 593.

When a widow dissents she shall be endowed as if her husband had died intestate.

Code, § 3251.

The mansion house shall be included in the dower estate.

Code, § 3247; *Vincent* v. *Vincent*, 1 Heisk. 333.

With the possibility of a dissent before him, and with certain knowledge as to the consequence which must follow, Dr. Brown made a will whereby he gave the mansion house to

NOTE.—The law as to the effect of a widow's election to take against a will upon rights of other persons in the estate is believed to be entirely found in the present case and in the *note* to Jones v. Knappen (Vt.) 14 L. R. A. 293, referred to by the court.

his daughter instead of his wife, and made no provision whatever against the disappointments which his daughter and grandchildren would suffer in the event his wife should dissent from his will. It must therefore be assumed that he intended the consequences of a dissent on the part of the widow to fall precisely where the law places them.

Re Vance's Estate, 141 Pa. 201, 12 L. R. A. 227.

The doctrine of election is founded on the same reasons and governed by the same rules when applied to a widow claiming dower as when applied to any other case.

2 Beach, Mod. Eq. Jur. § 1081; *Leonard* v. *Steele*, 4 Barb. 22; *Rutherford* v. *Mayo*, 76 Va. 117; *Jennings* v. *Jennings*, 21 Ohio St. 81.

One equitable or chancery consequence is that "compensation" is oftentimes allowed.

No court is authorized to make a new distribution for the sake of equality.

Re Vance's Estate, supra; Gretton v. *Haward*, 1 Swanst. 441, note.

Equity will sequester the interest intended for the electing beneficiary, to compensate Mrs. Taylor for the loss. But no other interests than that can be sequestered.

1 Pom. Eq. Jur. 2d ed. § 517; 1 Woerner, American Law of Administration, § 119; *Gretton* v. *Haward*, 1 Swanst. 441; *Jennings* v. *Jennings*, 21 Ohio St. 56; *McReynolds* v. *Counts*, 9 Gratt. 242; *Timberlake* v. *Parish*, 5 Dana, 352; *Sandoe's Appeal*, 65 Pa. 314; *Re Batione's Estate*, 136 Pa. 307; *Gallagher's Appeal*, 87 Pa. 200; *Jones* v. *Knappen*, 63 Vt. 391, 14 L. R. A. 293; *Colvert* v. *Wood*, 93 Tenn. 454.

A dissenting widow takes a distributive share of the personalty subject to the testator's debts and the expense of administration. It is not protected like the dower.

Code, § 3252; *Cannon* v. *Apperson*, 14 Lea, 556.

Legacies must abate ratably when necessary to pay debts and give the widow her third of the personalty remaining after paying debts.

Pritchard, Wills, § 471.

Mr. **N. R. Wilkes** also for appellants.

Mr. **E. H. Hatcher** for Mrs. Taylor.

Mr. **L. B. Hughes** for the Taylor children.

Wilkes, J., delivered the opinion of the court:

Dr. W. H. Brown, of Columbia, Maury county, Tenn., died, leaving surviving him his widow, Mrs. Mary Lou Brown, his daughter, Mrs. Maggie C. Taylor, and Lizzie C. and Willie B. Alexander, his grandchildren by a deceased daughter. He left a will by which he devised to his daughter Mrs. Taylor, for life, with remainder to her children, his residence, two storehouses and lots, and three other lots in Columbia. He left a farm of about 630 acres of land in Maury county, which, by his will, he divided into two equal parts, one half of which he gave to his widow for life, and the other half to the Alexander children, with certain limitations over in the event of their dying without issue. The half given to the wife, upon her death, was to be equally divided between Mrs. Taylor and the Alexander children, and the widow was given choice of the two portions. The personal property was also bequeathed, but as it all was required to pay debts, it need not be further considered. The widow dissented from the will, and dower was thereupon assigned her, embracing the residence, one storehouse, and the rent of the other for four years, all of which was property given by the will to Mrs. Taylor. The farm was divided into two parcels, of unequal size, but equal value, and Mrs. Taylor was allowed to take choice, on the idea that she was substituted to Mrs. Brown's rights in this regard, and she chose lot No. 1, being the larger parcel. Upon the bill filed to wind up the estate and settle the rights of the parties, the chancellor decreed that Mrs. Taylor should take the lot No. 1 for life, as part compensation for what she lost by the dissent, and that injury further had resulted to her as a consequence of the widow's dissent, and that such further injury or damage should be borne by Mrs. Taylor and the Alexander children in the proportion which they took in value in the estate of Dr. Brown. The master made a report designed to show the respective values of the shares, but the court was of opinion that it did not sufficiently appear what the amount of Mrs. Taylor's loss or injury was, and the report was set aside, and the master was directed to report in dollars and cents what would be just compensation to Mrs. Taylor arising out of the dissent and allotment of dower. Taylor and wife excepted to the action of the court refusing to confirm the clerk's report, but did not appeal. The Alexander children, by leave of the court, appealed before the coming in of the second report. The court of chancery appeals held with the chancellor, that not only the property thus refused by the widow could be given to the devisee, thus disappointed, but that the other devisees must contribute *pro rata* to make good the deficit, if any, according to the respective values given to them, the land renounced by Mrs. Brown in this case being insufficient to make good to Mrs. Taylor the loss sustained by her in consequence of the dissent; and it is mainly upon the latter portion of this holding that the case is now before us, it being clear that the devise refused by Mrs. Brown must go to Mrs. Taylor to reimburse or indemnify her in her loss under the dissent, unless the doctrine of acceleration prevails in behalf of the Alexander children. The holding and reasoning of the court of chancery appeals is that, when the widow dissented, her right of dower attached and became an encumbrance on all the testator's lands, no matter to whom devised; and that it "hovered" over all of them as an encumbrance until assignment made, and, inasmuch as the assignment made in this case was exclusively out of property devised to Mrs. Taylor, that devised to the Alexander children was thus relieved of the encumbrance, and, upon broad grounds of equity, their shares must contribute *pro rata* to reimburse Mrs. Taylor for the loss sustained by her. This contention, thus presented, has not been directly adjudicated in Tennessee, but it is claimed that in principle it has been decided in favor of the holding of the court of chancery appeals. For the Alexander children it is earnestly insisted that by Mill. & V. Code, § 3247, it is provided that dower shall be so allotted

as to embrace the dwelling house, outhouses, buildings, and other improvements, or, if it be unjust to give the widow all the house, a proper part must be assigned, and, unless great injustice result on account of the value of the house, its value is not to be taken into consideration. *Vincent* v. *Vincent*, 1 Heisk. 333. It is therefore argued that the right of dower is not a common burden which hovers over all the land until it is localized by assignment in a particular locality, but that it must be so located as to embrace the mansion house and other improvements, although it may embrace other lands in order to make the amount to which the widow is entitled. Assuming the correctness of this contention, it is therefrom argued that when the testator made his will, giving his mansion house to Mrs. Taylor, he must have had in view the law that his widow could take it by dissenting from the will; and inasmuch as he made no provision for such contingency, he must have intended that in such event Mrs. Taylor should bear the loss so far as she could not be compensated out of the property devised to the widow, and which, upon her dissent, she renounced. On the other hand, it is insisted for Mrs. Taylor that, the renounced property having been exhausted without fully compensating the disappointed devisee, she has the right to call upon all the other devisees to contribute *pro rata* to make up this deficit, and thus execute the will of the testator and preserve the rights of each, so far as may be, under the changed condition of affairs.

There is no serious question made, and cannot be, that the dissent of the widow, and her election to take what the law gives her, instead of under the will, is followed by the usual consequence of an election in other cases, and that the property designed for her in the will must be sequestered and given to her for compensation, as in other cases of election. 1 Pom. Eq. Jur. 497–517; *Jennings* v. *Jennings*, 21 Ohio St. 56, 81; *Dean* v. *Hart*, 62 Ala. 310; *McReynolds* v. *Counts*, 9 Gratt. 242; *Kinnaird* v. *Williams*, 8 Leigh, 400, 31 Am. Dec. 658; *Sandoe's Appeal*, 65 Pa. 314; *Re Batione's Estate*, 136 Pa. 307; *Colvert* v. *Wood*, 93 Tenn. 454; *Cauffman* v. *Cauffman*, 17 Serg. & R. 26; *Callahan* v. *Robinson*, 30 S. C. 249, 3 L. R. A. 497; *Allen* v. *Hannum*, 15 Kan. 625; 6 Am. & Eng. Enc. Law, p. 255, and notes; *Ford* v. *Ford*, 70 Wis. 55; *Jones* v. *Knappen*, 63 Vt. 391, 14 L. R. A. 293. But, in order to sustain the holding of the court of chancery appeals in this case, there must be the further interposition of the doctrine of contribution between the devisees in order to make up the deficit, when there is such deficit, after applying the property devised to the widow, and refused by her. For the Alexander children, it is insisted that no such doctrine of contribution exists, but that only the general results of an election follow, and hence only the refused share of the widow can be given to the disappointed devisee. The learned court of chancery appeals, speaking through Judge M. M. Neil, cites *Henderson* v. *Green*, 34 Iowa, 437, also reported in 11 Am. Rep. 149, and the case of *Robinson* v. *Harrison*, 2 Tenn. Ch. 11, as conclusive upon the point presented. In the first case the testator devised the plantation on which he resided to his wife, in lieu of dower, also certain personal property, and he gave 40 acres of land to Euretta Green, and 160 acres to Emily Booher, subject to the life estate of the widow. The widow dissented and took dower, and 80 acres of that assigned Emily Booher was given to her in the assignment, and 40 acres additional of Emily Booher's share was sold to pay debts. The court held that both devises to Mrs. Green and Mrs. Booher were specific, and that Mrs. Green's 40 acres must contribute also to the common burden of the widow's share upon her dissent. It will be noted in this case that all the lands, including the 40 acres given to Mrs. Green, were given to the widow for life, so that, to the extent of the life estate of the widow, it was simply sequestering that property given by the will to her, and not separate property given exclusively to a devisee, and it is conceded that all the property given to the widow may be sequestered under the general rule. It seems, however, that the court in that case did not limit the sequestration to the life estate, but held the entire 40 acres liable to contribution. The court also said that it was manifest from the terms of the will that the testator intended Mrs. Green should take her 40 acres burdened with the encumbrance of the widow's dower. We find no express language to this effect in the will, and the manifest intention must appear from implication or the general principles of law in such cases, if at all.

It is said that the later case of *Gainer* v. *Gates*, 73 Iowa, 149, is in conflict with the conclusions of the court of chancery appeals, and probably with the earlier case of *Henderson* v. *Green*, 34 Iowa, 437, 11 Am. Rep. 149. In it, Gainer devised all his lands, except his mansion and homestead, to his wife, and gave the homestead to plaintiff, and gave twelve legacies to twelve different legatees. The widow was, however, given a life estate in all the property, real and personal. The widow dissented and the homestead was assigned to her as dower, and this defeated the legacy to Gates. Suit was thereupon brought by Gates against the administrator and heirs to recover the value of the homestead thus lost. The effort in that case was to charge the estate with the value of the homestead, and the court held that indirectly this was an effort to recover from the heirs of the testator, and taking it out of the estate was making all contribute *pro rata*. The court said: "The law presumes that the execution of the will was with a knowledge of the law by the testator. He knew that nothing would pass to plaintiff except with the widow's consent. The law will presume that it was his purpose to make the devise contingent upon such consent; that his purpose and wish was that, if the wife did not hold the homestead, plaintiff should, but, if she did, plaintiff should take nothing by the will. If we may inquire into the purpose and wish of the testator, we can reach no other than this conclusion." The question of compensation under the general doctrine of election appears to have been ignored. This case is somewhat obscure, both in its statement of facts and conclusions of law, and was decided upon several grounds not applicable in this case. It was not an effort to recover from the legatees or devisees, but from

the administrator and heirs, and it appeared there was fund enough passing in residuum to the heirs to compensate for the loss, and it was this fund which was sought to be reached. The legatees and devisees were not before the court, and not affected by the holding. The court said: "We need not inquire whether this doctrine is applicable to the case of the widow and the beneficiaries under the will other than plaintiff, for the reason that no claim is made against them in this action. It is surely not applicable to the heirs, who will take the residue of the estate." And the court's conclusion was that the plaintiff could not recover against the estate, which was not bound by any contract to him. Mr. Farnham, the annotator of the Lawyer's Reports, cites this as one of the two cases out of harmony and line with the current of authority, and refers to it as a peculiar case. It clearly does not consider the right to contribution from the other legatees and devisees under the will; and the doctrine of compensation so uniformly held in other cases was not discussed, but was ignored, and the decision was placed upon other and different grounds. See *Jones* v. *Knappen* (Vt.) 14 L. R. A. 293, and *notes*.

The special question of requiring the residuary legatees and devisees or the heirs to make good such deficiency is considered in the cases of *Re Vance's Estate*, 141 Pa. 201, 12 L. R. A. 227; *Gallagher's Appeal*, 87 Pa. 200; *Timberlake* v. *Parish*, 5 Dana, 352. The gist of these decisions, as we understand them, is that the residuary legatees, and, by parity of reason, heirs, will be required to make good such loss, rather than specific legatees. In the case at bar this question does not arise, as there is no residuary fund, and no intestacy as to any property, and the effort is to enforce contribution among special devisees; that is, devisees of specific property.

Sandoe's Appeal, 65 Pa. 314, is much commented upon. In that case, Bard, the testator, gave to his daughters pecuniary legacies, to his son William his mansion place, subject to certain charges for his wife, and, if he died before twenty-one without issue, the mansion place to go over to Jefferson, his other son, in fee. The executors were directed to buy a farm for Jefferson, equal to the mansion place, if he desired it, and to sell other real estate for that purpose. The widow dissented. The assets were not sufficient to meet the provisions of the will. The court directed the pecuniary legacies to the daughters to be paid in full, and whatever deficit there might be after sequestrating the benefits intended for the widow, and selling the real estate specified in the will, should be paid out of William's mansion farm. It was evident from the whole will that the testator intended William and Jefferson to share equally in his estate. The decree directed the deficiency, after selling the other real estate, to be raised out of William's mansion farm, taking care, however, to preserve the equality of value between the two brothers. It appeared that William had received $4,123.91 more than his share, and it is evident the clause in the decree had special reference to this feature, and intended it to be refunded if necessary; and we think the case not only holds and announces the general doctrine that the renounced share of the widow shall be applied to the reimbursement of the disappointed legatee or devisee, but that the remaining devisee, William, must contribute to make up any deficiency so at all times to keep the shares of William and Jefferson equal, which was the primary intention in the will.

The case of *Robinson* v. *Harrison*, 2 Tenn. Ch. 11, is also referred to as sustaining the conclusion of the court of chancery appeals by that court. In that case the chancellor held that, when the personal assets were insufficient to pay debts and the widow's distributive share of one third, it was the duty of the executor to make the deficiency fall proportionately on all the specific devises and bequests, and to account to the widow for the stock bequeathed to her, less her proportion of the loss, and he did not have the right to select one legacy to bear the burden of the widow's dissent, whatever may have been his right to dispose of the stock to pay debts. This case, it appears, was affirmed in the supreme court. It is assailed upon the ground that the court proceeded in that case upon the idea that the widow's "third" of personal estate was, like her dower, superior to the claims of creditors, which was incorrect, and that the legatees and devisees made no question or resistance, and such seems to have been the case. But this, we think, does not destroy the force of the decision, because the widow's right to her "thirds" is superior to the claims of special legatees under the will; and the court proceeded upon this idea in making the burden of the "thirds" fall equally upon all the special legacies, there being no general or residuary legacy. This was evidently what the court intended to decide in a case of legacies, making the widow's "thirds" occupy the place of dower in this case.

A very strong and ingenious argument is made upon the theory that the dower right before assignment is not an encumbrance "hovering" over the whole of the lands of the deceased. It is said that, upon the husband's death, the dower of the widow becomes a consummate or "vested right," which ripens on assignment into a freehold estate; and this is unquestionably correct. 2 Scribner, Dower, 8, 26, 28. But it is further insisted that it is a localized right to the mansion house, and not an encumbrance hanging over the whole estate, and that the mansion must be assigned unless great injustice would result, and even then a part of the mansion must be assigned, and hence it must be so localized as to rest on the mansion premises; and the testator, knowing this as a matter of law, intended that, if the mansion was taken by the widow, then Mrs. Taylor, to whom it was given, must lose it. Even if we were to concede the correctness of the proposition as to the first statement, that the widow must take the mansion in her dower assignment, the conclusion deduced is still a debatable proposition, and by no means follows as a logical result. But we are not prepared to assent to the correctness of the first proposition. We do not think that, prior to the allotment of dower, the widow acquires a freehold estate in the land at any place. She has no estate until assignment; afterwards she has. *Thompson* v. *Stacy*, 10 Yerg. 493; *Whyte* v. *Nashville*, 2 Swan, 364. She is not required to take the mansion

in her dower. She may waive it, and take dower elsewhere. The right to the mansion rests upon her choice alone, and it is not imposed upon her against her will. The heirs or devisees cannot require her to take it, but it is optional with her. If, in this particular case, she had elected to take the lands allotted to the Alexander children, would it be insisted that they would have been confined to the land refused by her to reimburse themselves? It is evident in this case that the testator did not intend his daughter and grandchildren should share equally in his bounty, but only in certain proportions, and this is not disturbed, but followed, by the conclusion reached by the court of chancery appeals; that is, the relative proportions of Mrs. Taylor and the Alexander children are attempted to be preserved as indicated in the will.

The guardian *ad litem* for the Alexander children presents still another view of the case, so far as their rights are concerned, which is that, by the will, they are remaindermen of a fourth of the tract of 630 acres of land offered to the widow for life by the will, but renounced and refused by her upon her dissent. It is insisted that, the widow having declined and refused to take this life estate in one half the land, the estates of the remaindermen were accelerated, and they became, immediately on her refusal, entitled to enter upon and enjoy this part of the land out of which the widow was, by the will, to have a life estate. This contention is based upon the holding of this court in *Robinson* v. *Harrison*, 2 Tenn. Ch. 11; *Waddle* v. *Terry*, 4 Coldw. 51; *Armstrong* v. *Park*, 9 Humph. 195; *Brown* v. *Hunt*, 12 Heisk. 405; *State* v. *Smith*, 16 Lea, 667. And this is unquestionably the general rule, but, under the facts in this case, the right or equity in Mrs. Taylor to compensation for her loss is superior to, and must prevail over, the right and equity of the remainderman to be accelerated. *Wood* v. *Wood*, 1 Met. (Ky.) 515; *Timberlake* v. *Parish*, 5 Dana, 352; *Jones* v. *Knappen* (Vt.) 14 L. R. A. 294, 295, and *notes* on page 295.

The decision of the Court of Chancery Appeals is affirmed, and the cause will be remanded to the chancery court at Columbia for the execution of the order made by that court, and the costs will be equally divided, as decreed by that court.

STATE of Tennessee, to Use of OVERTON COUNTY,
v.
Hardy COPELAND *et al.*, *Appts.*

(.....Tenn.....)

1. **An officer is not an insurer of the safety of public funds** in his hands on a bond faithfully to perform his duties and to collect and pay over moneys, but responsible only for the exercise of good faith, diligence, prudence, caution, and a disinterested effort to keep and preserve the funds for those entitled.

2. **An officer is not to be considered as a debtor** for public funds in his hands which he has no right to use in any way except for the purposes of his trust; and he holds them, not strictly as a special bailee, but as a trustee clothed with legal duties and liabilities.

3. **The liability of a county trustee who gives a bond** faithfully to perform the duties of his office and collect and pay over school taxes, is fixed, not merely by the terms of his bond, but by the laws relating to his office.

4. **A deposit of public funds in a bank** of undoubted standing and reputation is not negligence or want of proper business prudence and caution on the part of an officer.

(March 2, 1898.)

APPEAL by defendants from a judgment of the Overton County Chancery Court in favor of plaintiff in a proceeding to enforce liability on the county trustee's bond for money which he had not turned over. *Reversed.*

The facts are stated in the opinion.

Messrs. **Vertrees & Vertrees, J. A. Barnes, W. W. Goodpasture,** and **W. H. Hussey** for appellants.

Mr. **G. B. Murray** for appellee.

Wilkes, J., delivered the opinion of the court:

This is a bill against the defendant Hardy Copeland and others, as sureties upon his official bond as county trustee of Overton county, for school taxes deposited by him in the Nashville Savings Company, at Nashville, Tenn., called in the record and generally known as "Marr's Bank." Upon the hearing, the chancellor gave judgment against the defendants for $3,119, and interest from October 12, 1895, and all costs, and the defendants have appealed and assigned errors. These assignments are as follows: (1) In finding that Mr. Copeland was not sufficiently careful and diligent; (2) in holding that Mr. Copeland should have acted only upon an examination of the bank, made or caused to be made, or upon knowledge; (3) in holding that Mr. Copeland, as trustee, was bound, in law, to account for and pay over this fund, unless it was lost by the act of God or the public enemy; (4) in rendering a decree against Mr. Copeland and his sureties for the full penalty of the bond, to be discharged upon the payment of $3,119 and interest; (5) in rendering a decree against the defendants for said $3,119, interest, and costs; (6) in not rendering a decree dismissing the bill.

Only two real questions are presented, the first of which is whether Copeland was an insurer of the safety of the funds in his hands, and the other whether, if not an insurer, he exercised that degree of care that he should have done for the safe keeping of the funds in his hands. We consider the first proposition primarily, for, if it be held that the trustee is liable for such funds in every event and under all contingencies, except when the loss arises from the act of God or the public enemy, then the latter question is immaterial, and need not be considered. The learned chancellor in the court below delivered a written opinion, from which the reasons and grounds of his decision may be gathered. He says: "I am fully satisfied that Copeland did not intend or ex-

NOTE.—As to the conflicting authorities on the liability upon an officer's bond for loss of money by bank failure, see Wilson v. People, Pueblo & A. V. R. Co. (Colo.) 22 L. R. A. 449, and *note*; also the case of Fairchild v. Hedges, *post*, 851.

pect to lose the money when he placed it in Marr's Bank, and he believed it was safe there until a very short time before the bank failed, and perhaps up to the date of its closing." The chancellor then adds: "In the view I take of the case, conceding that Copeland acted in good faith, believing that this bank was entirely safe, the question is, Can a trustee make such a defense avail him in case the money is lost by the failure of the bank?" And the chancellor finally says: "I am constrained to hold that the defendant Copeland and his sureties are responsible for the money under the facts of this case, both upon the ground that the defense set up in the answer that the bank had a good reputation, was an old bank of high standing, that the deposit was made in good faith and confidence, and lost by the failure of the bank and without negligence on the part of Mr. Copeland, was not good in law, and also that the facts do not establish that high degree of diligence that would excuse defendants from accounting for the money even under the rule requiring a 'faithful discharge of duty.' . . . This is not a question of intent. It is a question of diligence or negligence, in a legal sense." The question of the measure of liability of a public officer for funds in his hands is one of prime importance, and at the same time one upon which there is some diversity of opinion. In some cases, the liability of the officer is made to turn upon the terms of his bond and it is construed as having been enlarged, and made an absolute engagement to pay over the money in any event and under every contingency. In other cases, the officer is regarded as a debtor for the funds that go into his hands, and not a bailee or trustee of such funds. In other cases, the officer is held liable on broad grounds of public policy, and the obligations resting upon him are made absolute and unconditional, because a different construction would open up a door for fraudulent practices and evasions by public officials. The matter is forcibly presented in the notes to *State* v. *Harper*, reported in 67 Am. Dec. 363–373, and also in the case of *Wilson* v. *People, Pueblo & A. V. R. Co.* (Colo.) reported in 22 L. R. A. 451, and *notes*, where the several grounds of liability are referred to, and the cases cited under each.

Considering these grounds of liability in the order named, it is evident that the terms of the bond must have some weight in determining what the liability of the officer is. But the main object of the bond, under our law, is not to fix the limit of the officer's liability, but to superadd the security of the bondsmen to that of the principal. The liability of the bondsmen is outlined in the bond, but, after all, the extent of liability of both principal and sureties, and the obligations they are under, are fixed and limited by the statutes and laws relating to such officers. The bond required of the county trustee to cover school funds is a special one. Mill. & V. Code, § 712. The bond executed by the defendant is in these words: "Now, therefore, should the above bounden Hardy Copeland truly and faithfully perform the duties of the office of county trustee for the term of his office, and shall faithfully collect and pay over, within the time and in the manner prescribed by law, to the proper officer designated by the laws of Tennessee to receive the same, all school taxes by him collected, or that ought to be collected during his said term of office, then his obligation to be void; otherwise to remain in full force and effect." The oath required of the officer is to the same effect as the bond. Mill. & V. Code, § 716. The trustee is required to keep the school funds separate from all others (Mill. & V. Code, § 1167); and to use it directly or indirectly, or to receive or agree to receive any fee or interest from any bank for the deposit or use of the money, is made a felony (Acts Ex. Sess. 1885, chap. 16). The bond does not, in terms, fix the extent of the officer's liability. That is regulated by law, and we are of the opinion that there is nothing in the terms of the bond or the requirements of the statutes that makes the officer liable as on contract to keep, at all hazards and under every contingency, and to pay over funds in his hands, but he is only obligated to pay according to law. Can he, under our law, be held as a debtor for the fund, and hence liable for it in any event? If so he is impliedly given the right to use the funds, to receive and retain interest upon them, and to use them as his own. In the cases holding this doctrine, it is laid down that, if the officer make a profit or interest by using the fund, he is not liable therefor, but the usufruct belongs to him. This is certainly not the theory of our law, which makes it a felony for the officer to use it directly or indirectly, or to receive or agree to receive any interest from any bank for the use or deposit of it; and not only is it contrary to the statute, but, in our view, it is an unwise policy to consider the officer as a debtor. He is a trustee charged by statute with certain duties and responsibilities, but having no right to use the funds for his own purpose or to make them his own.

The third class of cases so construes the bonds, and so fixes the duties of public officers holding public funds, as to make them insurers of the safety and forthcoming of the fund, upon broad grounds of public policy. The leading case holding this doctrine of strict accountability is that of *United States* v. *Prescott*, 44 U. S. 3 How. 589, 11 L. ed. 739. In that case the bond was conditioned to keep safely and pay over when required to do so, and the court held the officer liable although the funds were stolen without fault on the part of the officer. This was followed in *United States* v. *Dashiell*, 71 U. S. 4 Wall. 182, 18 L. ed. 319, where the condition of the bond was to pay over and account, and in *Boyden* v. *United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 527, where the condition of the bond was to discharge all the duties, and, under the act of Congress, it was the duty of the officer to pay over. This was followed by the case of *United States* v. *Morgan*, 52 U. S. 11 How. 154, 13 L. ed. 643; *Berans* v. *United States*, 80 U. S. 13 Wall. 56, 20 L. ed. 531; *United States* v. *Keehler*, 76 U. S. 9 Wall. 83, 19 L. ed. 574; *United States* v. *Watts*, 1 N. M. 553; *State* v. *Nevin*, 19 Nev. 162. The rule has been followed in many cases in the state courts, and evidently on the authority of the leading case. We cite only a few by way of illustration. In *State* v.

Moore, 74 Mo. 413, 41 Am. Rep. 322, the bond was "to perform all the duties," and the statute made it a duty to "deliver to his successor all money," and the officer was held liable for depositing money, as treasurer, in a bank of high standing that subsequently failed. In *Omro Supers.* v. *Kaime*, 39 Wis. 468, the bond was "to faithfully discharge the duties," and "properly and legally disburse and pay all moneys," and the officer was held liable for a deposit in a bank of good reputation, but which afterwards failed. In *State* v. *Croft*, 24 Ark. 550, the condition was "safely to keep the money," and it was lost by failure of a bank reputed to be good, and the officer was held liable. See other cases cited in 22 L. R. A. 451, in the *notes* to the case of *Wilson* v. *People, Pueblo & A. V. R. Co.*, reported also in 19 Colo. 199, and 34 Pac. 944; *State* v. *Harper*, 67 Am. Dec. 363, and notes; 2 Am. & Eng. Enc. Law, p. 4661, 466*m*, notes 1, 2. It is evident that the chancellor followed the rule laid down in the *Prescott Case* and cases in harmony with it, and held defendants liable on grounds of public policy. He says: "Ruin will occasionally fall upon an innocent man, but better this than to open a door for the escape of a dishonest custodian of the means wrung from the honest taxpayer for the support of the government and the education of the children." On the other hand and holding a modified or contrary doctrine, may be cited the case of *United States* v. *Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89, decided in 1872, in which the case of *United States* v. *Prescott*, *supra*, was limited, and it was held that an officer would be excused by the act of God or the public enemy. It is there said: "The general rule of official obligations as imposed by law is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation." And again: "Where, however, a statute merely prescribes the duties of the officer as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility." By an act passed in 1866, the Congress of the United States provided that officers who lose public funds without fault or negligence may present the matter to the court of claims, and if that court find the fact to be that way, it shall be so certified, and the officer shall be given credit by the treasurer in his accounts. Since then, it has also been provided that certain classes of officers, like revenue collectors and clerks, shall deposit the funds in banks,—designated depositories of the United States. Consequently it appears that, when the act of 1866 and the decision in *Thomas's Case* are considered, the rule of liability with respect to United States officers is that they are not liable for public funds lost without fault or negligence on their part. It is evident that the rule laid down in the *Prescott Case* was considered too harsh and exacting, and Congress by the act of 1866 prescribed a different degree of liability.

There are other cases, however, which have not followed the *Prescott Case*, among which may be cited *York County* v. *Watson*, 15 S. C. 1, 40 Am. Rep. 675. In this case it appeared that the county treasurer had deposited the public money in his hands in a savings bank. The bank failed, and the money was lost. The bank had a good reputation, and the money was deposited to his credit as treasurer. The court held that he was not liable. The court stated the rule of liability as to trustees, receivers, administrators, guardians, and the like, and then asks: "If it would be wrong in principle to hold a private trustee responsible for loss which no care of his could have prevented, would it not be equally wrong to hold a public officer responsible under like circumstances?" The question is answered in the affirmative by the opinion. *Cumberland County* v. *Pennell*, 69 Me. 357, 31 Am. Rep. 284. In this case the county treasurer had money in his safe in his office. Robbers came in, and beat him up, and then robbed the safe. The court below ruled that it was no defense, but, on appeal, the supreme court held that it was a good defense, and that he was not liable. The case is well reasoned, and announces the rule of the common law. In reviewing the cases which follow *Prescott's Case*, Virgin, J., says: "Notwithstanding the high character of the several courts whose decisions are above cited, we cannot yield our convictions as to the construction to be given to the bond in such case, or concur in relation to the new-born public policy, based upon supposed facility or temptation, which depositaries of the public money are said to possess for collusive robberies. 'For,' as was said by Redfield, J., in *Bridges* v. *Perry*, 14 Vt. 262, 'we cannot believe that they are founded upon any just warrant, either of sound judgment or constant experience.'" This case was approved in the later case of *Strout* v. *Pennell*, 74 Me. 262. In Alabama it is held that a tax collector who, without fault, is robbed by irresistible force, is not liable for the money of which he is robbed. *State* v. *Houston*, 78 Ala. 576. 56 Am. Rep. 59. The court of appeals of New York considered the question in *People, Nash*, v. *Faulkner*, 107 N. Y. 477. In that case it appeared that the surrogate deposited moneys in his hands, which were the proceeds of judicial sales, in a private bank, which failed. He received interest on the fund, for the benefit of the litigants, but it was deposited subject to check or demand. The court recognizes the distinction between public funds and private moneys of litigants, and it also reviews the Federal cases in the light of the act of Congress of 1866 and the case of *United States* v. *Thomas*. The common-law rule of liability was declared to be the true one, and care and good faith to be the measure of liability. As the banker in that case was a man of good standing, and there was no negligence, the surrogate was held to be not liable. This case also recognizes the present condition of things,

—that it is the part of prudence to keep funds in bank, or the best and safest place. *Wilson* v. *People, Pueblo & A. V. R. Co.* 19 Colo. 199, 22 L. R. A. 149. In this case, a clerk of a court deposited the money in his hands as clerk in a bank of good standing. The bank broke, and the fund was lost. It was held that the clerk was not liable. Among other things, the court, through Goddard, J., said: "From the agreed facts it appears that the money was lost through no fault of the clerk. He deposited the money in a bank of reputed solvency, as clerk of the court, and in doing so acted as prudent men ordinarily do with their own funds. The judgment of the court below must therefore be upheld, if at all, upon the principle that the conditions of his official bond imposed upon him an absolute obligation to pay the money when required, and that no exercise of diligence on his part will exonerate him from such obligation. Such is the contention of counsel for appellee, and for its support he relies on the case of *United States* v. *Prescott*, 44 U. S. 3 How. 578, 11 L. ed. 734, decided by the Supreme Court of the United States in 1845, as the leading case, and several other cases in that court, as well as some decisions by state courts, which approve and follow the doctrine therein announced. In these cases in which the rule contended for was sustained, the court had under consideration the liability imposed by the official bond of receivers of public money, and the conclusions arrived at were influenced largely by considerations of public policy. Whether the case at bar is sufficiently analogous to these cases to bring it within the rule therein announced it is unnecessary to decide, since the Supreme Court of the United States in a later case has very much modified, if it has not in effect overruled, the extreme doctrine laid down in its earlier decisions. In the case of *United States* v. *Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89, Justice Bradley, in speaking of the leading case of *United States* v. *Prescott*, *supra*, said: 'After reciting the condition of the bond, the court adds, with a greater degree of generality, we think, than the case before it required: "The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it when required can discharge the bond." This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events, . . . and as the money in the hands of a receiver is not his,—as he is only custodian of it,—it would seem to be going very far to say that his engagement to have it forthcoming was so absolute as to be qualified by no condition whatever, not even a condition implied in law.' And, after reviewing the principal cases relied on by appellee, he further said: 'So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges, in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing, and a condition to do the same thing, inserted in a bond. In the latter case, the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case. . . . The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default is made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes.' While the majority opinion distinguished the case under consideration from those preceding it, we think the reasoning of the learned justice who wrote the opinion logically and necessarily overrules the doctrine laid down in the former cases. If, as therein announced, the obligation imposed by the bond is absolute, and the officer was an insurer of the money received by him, how could the manner or cause of its loss affect his liability? Wherein is he more at fault when overpowered by one or two robbers than he is when intimidated by an army? Justice Miller refused to concur in the majority opinion, because it did not frankly overrule those cases and abandon the doctrine on which they rested, and in his dissenting opinion stated his personal views upon the question, as follows: 'When the case of *United States* v. *Dashiell*, 71 U. S. 4 Wall. 182, 18 L. ed. 319, came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that, on sound principle, the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given, the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that, prior to these decisions, there was any principle of public policy recognized by the courts or imposed by the law, which made a depositary of the public money liable for it when it had been lost or destroyed without any fault or negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safekeeping.' We believe the true rule is that a public officer who receives money by virtue of his office is a bailee, and that the extent of his obligation is that imposed by law; that when unaffected by constitutional or legislative provisions, his duty and liability is measured by the law of bailment. If a more stringent obligation is desired, it must be prescribed by statute; that his official bond does not extend to such obligation, but its office is to secure the faithful and prompt performance of his legal duties. Instances where the Constitution and

statutes of the state have increased the common-law liability of certain officers have been recognized by this court in two cases at least. In the case of *State* v. *Walsen*, 17 Colo. 170, it was held that, by the constitutional provisions, the state treasurer was made absolutely liable for state moneys received by him; and in the case of *McClure* v. *La Plata County Comrs.* 19 Colo. 122 (recently decided), it was held that a county treasurer, by virtue of the statute regulating the duties of his office, was a bailee with express and extraordinary liability. No constitutional or statutory provision in this state imposes a more stringent obligation upon a clerk of the district court than that imposed by the common law. This rule of common law, as laid down by Justice Story, is as follows: 'In respect to property in the custody of the officers of a court, pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence. If the property is lost or injured by any negligent or dishonest execution of the trust, they are liable in damages. . . . The degree of diligence which officers of the court are bound to exert in the custody of the property seems to be such ordinary diligence as belongs to a prudent and honest discharge of their duties, and such as is required of all persons who receive compensation for their services.' Story, Bailm. § 620. It is insisted in argument that this doctrine refers only to specific property, and does not apply to money deposited with the clerk, because it is assumed that he holds the relation of debtor to the fund, and therefore may use it as his own. To this we cannot agree. The money received by him is a trust fund, and a conversion of it to his own use would constitute embezzlement, and subject him to criminal prosecution. The defendant, Wilson, as appears from the agreed facts, did not mix the money in question with his own funds, or in any manner treat it as his own. He deposited it in the bank as clerk, and the bank had notice thereby that the money so deposited was held by him in his official capacity. At the time of the deposit the bank was in good standing. We think, under the circumstances, he is not chargeable with any fault that should render him or his sureties liable for the loss. The judgment of the court below will be reversed, with directions to enter judgment for defendants."

This principle has been recognized and announced in Tennessee. In *The Governor* v. *M'Ewen* (1842) 5 Humph. 265, it was declared that the liability of public officers is to be determined like that of private trustees; or, as Reese, J., expressed it, "the measure of fiduciary responsibility, in the view of a court of chancery, will be the same, whether arising from public or private relations." In *Peck* v. *James* (1859) 3 Head, 76, the rule was reaffirmed. James, the trustee of Granger county, moved against Peck, his predecessor in office, for a balance of school funds in his hands. Thereupon Peck filed a bill to be exonerated, on the ground that the money had been paid to him in bills of the Bank of East Tennessee, but that the bank broke before he was required to pay out all the fund, and while a balance of $680 in these notes remained in his hands. It was held that the trustee was entitled to be exonerated. "We think," said Caruthers, J., "the principle settled in the case of *The Governor* v. *M'Ewen*, 5 Humph. 265, must govern this. It is held in that case that 'the measure of fiduciary responsibility, in view of a court of chancery, will be the same, whether arising from public or private relations;' and that in the absence of bad faith, the same fair and equitable principles of adjustment which govern the subject of agency in general will be applied to and regulate the accountability of public agents." There are other cases where the officer and his sureties were held liable, but upon other grounds, which do not exist in this case. In *Hill* v. *Alston*, 12 Heisk. 569, the clerk and master of Shelby county was held liable for money lost by the failure of the bank in which it was deposited. It appeared that the money was deposited in his individual, and not in his official, name. The money so deposited was partly money he had received officially and partly his own private means. Interest was paid to him on these deposits. He was held liable on the ground that the money was deposited with his personal money to his individual credit, under an agreement to receive interest thereon. The inference is undeniable that, if the facts had been otherwise, the clerk would not have been held liable. In *Comfort* v. *Patterson*, 2 Lea, 670, the question was whether a clerk and master could set off a claim on account of a deposit made in a broken bank, against a note the bank held against him. The facts were that the deposit was to the credit of "M. L. Patterson, C. & M." It really consisted of (1) his individual means, (2) and costs to which he was entitled, (3) and funds received officially. A few days before the bank failed, he deposited $1,500 of his individual means to the credit of this account. The note against which he pleaded the set-off was only for $1,000. It was held that this plea of set-off was good. It was held that the clerk's "individual" share of the fund exceeded his indebtedness, and could be set off against it. The question was reserved whether he could set off the balance of the fund against an individual claim. It was said, by way of *dictum*, that funds of various cases, deposited in one general deposit in the officer's name as clerk and master, "without any designation of the case or party entitled," would be personal, and the words would be *descriptio personæ*, "not altering the rights of either party."

We think that it is not in accord with the spirit of our decisions, whatever it may be elsewhere, nor with sound public policy, to hold a public officer liable for public funds as an insurer. His obligation is the same as that prescribed by the common law, which is that he discharge his trust with diligence, prudence, caution, and good faith, such as prudent persons bestow upon their own important affairs. This is the rule laid down in Mechem, Pub. Off. § 301; Murfree, Off. Bonds, § 197; *United States* v. *Thomas*, 82 U. S. 15 Wall. 342, 21 L. ed. 91; *Cumberland County* v. *Pennell*, 69 Me. 357, 31 Am. Rep. 284. Under such rule, a private trustee is not liable for money lost by the failure of a bank, when the reputation of the bank is good, and the money is deposited in good faith to the trustee's credit, separate

and apart from his own (1 Perry, Tr. 443; *Dietz* v. *Mitchell*, 12 Heisk. 676); and the same rule applies to an administrator (*Willeford* v. *Watson*, 12 Heisk. 476), or an executor (Pritchard, Wills, 699). It is difficult to see what just end or sound public policy can be subserved by adopting a different rule as to public officials. If a public officer is held to be an insurer against loss when he exercises the utmost diligence, caution, and good faith, it will result that no man of any financial standing or business prudence would accept a public trust which involves the handling of public money. There would be but little inducement to act honestly and in good faith, since neither would avail against an unforeseen and unavoidable casualty. We are of opinion that, under our statutes and decisions, a public officer intrusted with public funds is not an insurer against loss, but is liable only if he acts without proper diligence, caution, prudence, and good faith. We think this is the sound rule, notwithstanding the weight of earlier authority holding the contrary doctrine, and all or nearly all based upon the *Prescott Case*.

We proceed, therefore, to examine whether Copeland, the trustee, did exercise the proper diligence, caution, prudence, and good faith necessary to absolve him from liability for the loss in this cause. He had in his hands $5,000 of public money, which he deposited in Marr's Bank on the 9th of February, 1893. He could not, at the time, lawfully pay it out, and it was his duty to keep it. Before making the deposit in that bank he consulted the judge of the county court of Overton county, and requested him to have the court designate a place to put the fund until he was called upon to pay it out, stating that he would put it anywhere the court would select. He advised with Mr. Windle, one of his bondsmen, and a good business man and merchant, as to where it should be placed, and Windle suggested that the local bank of Livingston, in Overton county, could be easily robbed, and advised that it be kept in some Nashville bank. The trustees of the county, for several years, had, as a matter of safety, deposited the public funds under their control in Nashville and Sparta. He conferred with many persons, who advised that it be placed in some good bank. Marr's Bank stood high at the time. Defendant's bondsman, Windle, recommended it. He was advised by Judge Goodpasture, a former resident of Overton county, a man of experience and substance, to select Marr's Bank, with the statement that he had been depositing in it for twenty-six years. He was then residing at Nashville, and depositing in it. It appears to have been the only bank in Nashville that did not close its doors in the panic of 1873. The reputation of the bank at Nashville, as well as elsewhere, was excellent. It had been in apparently successful operation for thirty years. Other bankers, lawyers, and business men of Nashville say that its reputation was above suspicion. The money was put to his credit as trustee, and was not mixed with any funds of his own. It remained until June 13, 1893, when Copeland attempted to draw it out. After persistent demands, $2,000 was paid, and then the remaining $3,000 was again persistently demanded. The whole of it was all the time subject to check on demand. The bank could not pay the $3,000 and suspended, and assigned on the next day, and proved to be totally insolvent, and only a *pro rata* of about 6 per cent, or $180, has ever been received since its suspension. It is said, however, that the deposit was made with an understanding that Copeland was to receive 6 per cent interest on it, and interest was subsequently entered up on the account on the books of the bank, the amount being $42.50, as of date March 31, 1893. Copeland denies positively that he ever received a cent of interest, directly or indirectly, or that there was any agreement that he should receive any. It appears to have been the custom of the bank to enter upon the pass book of the customer the fact that interest was to be allowed, when such was the agreement, and no such entry was made upon the pass book given to Mr. Copeland. There was, however, an entry made on the ledger of the bank, after the name of Copeland, trustee, "6 per cent." This is explained by Mr. Freeman, the bookkeeper, with the statement that the "country accounts" of the bank were, as a rule, interest-bearing, and he so entered it without any instructions to do so. Marr gives the same explanation. All the witnesses, Marr, Freeman, Copeland, and Goodpasture, state that no interest was to be paid; Marr's statement being somewhat indefinite and negative in character. It appears that, previous to this, Copeland had some funds in the local bank of Livingston, which offered to pay interest on the deposit, which Copeland refused; but he did accept a gratuity, as he says, a present, in consideration of his deposit, and a credit of 2 per cent was entered on his account on several occasions.

The statement of the president and cashier of the bank at Livingston are given, and from these we get the only intimation of fact which tends to show any want of good faith and unselfish action on the part of Copeland, outside of the book entry to which we have already referred. It appears that the defendant Copeland had $1,700 on deposit in this bank, and drew it out only a day or two before making the deposit in Marr's Bank. He had kept his money in this bank for a year or two, and had been paid interest or a gratuity as before stated. It is argued from this, and the entry upon the ledger at Marr's Bank, that Copeland was to have interest from the latter bank at the higher rate of 6 per cent instead of 2, as paid by the Livingston Bank. Mr. Estes, the cashier of the Livingston Bank, states that, a short time before the failure of Marr's Bank, he met with Copeland in Nashville. At that time there was a financial panic all over the country, which had affected the country banks as well as the city banks of Nashville. The Capital City Bank of Nashville closed, and on the next morning witness had a conversation with Copeland, in which the distressed condition of all the banks was commented upon, and in that conversation Copeland stated that he had his money in Nashville, and was a little uneasy about it. Witness said to him, if he would take his deposit back to the Livingston Bank, he could check on it at any time, and he and Miller, the president, would go security for the bank, and allow 4 per cent interest on

the deposit. Copeland replied, "Can't you beat that?" and witness responded that he could not and would not; and Copeland thereupon replied, "I can beat that here in Nashville." He then adds, but in a very indefinite way, that he intimated to Copeland that Marr's Bank was unsound, and Copeland then referred to the Fourth National of Nashville, and left witness under the impression it was in the Fourth. A few days thereafter Copeland was in Livingston, and stated to witness that he had seen Miller, the president, and he had agreed to the proposition witness had previously made. On this occasion witness states that he again referred to the unsoundness of Marr's Bank. He proves that he and Miller, at that time, were worth $20,000 of property free from incumbrance and subject to execution. On cross-examination he states that Copeland did not say, in the Nashville conversation, that he could do better because he could get a higher rate of interest. He was also examined as to the condition of the Livingston Bank, and stated that it had a capital of $20,000; that it owed depositors, at the date Marr's Bank failed, $37,307.04, and had cash $4,527, and loan notes, $28,700; that it had tied up in the Commercial National Bank, which had then failed, $20,080.80; that after the failure of the Commercial National Bank the Livingston Bank borrowed all the money it could get, and paid 10 to 12 per cent for it from some parties, and lower rates to others, the cashier and president going the bank's security. Miller corroborates Estes in many particulars. He states, in addition, that he offered Copeland interest on his deposit, which Copeland declined, but said he would accept a gratuity; that they borrowed all the money they could get to tide their bank over the financial troubles. Copeland, being recalled, states that in the conversation at Nashville, no mention whatever was made of Marr's Bank, and only upon one other occasion, when Mr. Estes, referring to one of Marr's circulars, said that his bank would break some day. He corroborates Estes and Miller about the proposition to return the funds to the Livingston Bank, and that Miller and Estes would be securities, and allow 4 per cent interest, to which he replied he could beat that,—meaning that he could beat it by keeping the money safe, for he had examined into the condition of the Livingston Bank after the failure of the Commercial, and did not consider it safe, and knew that it was borrowing all the money it could get. He consulted with attorneys and others, and was advised not to return his money to the Livingston Bank, and in this he is corroborated by several witnesses. This is the substance of all the testimony as to the condition of the bank and the caution and care exercised by defendant Copeland in regard to it.

It is said that defendant had no right to deposit it in any bank; that by so doing he simply parted with the money, and made the bank his debtor; that he could not loan the money directly to a bank or an individual; that a deposit is virtually a loan; and that it should have been kept as a special deposit in some vault or safe. This argument, we think, is quite plausible, but is more specious than sound. If the money had been deposited in a vault of a bank, or in a safe, and lost, under the authorities cited and relied on by plaintiff the defendant would still have been liable, even though it had been placed in a safe furnished for that purpose by the county or state authorities. *Jefferson County Comrs.* v. *Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *Wilson* v. *People, Pueblo & A. V. R. Co.* (Colo.) 22 L. R. A. 451, *note*. The question resolves itself into a business proposition, whether it is more prudent to deposit the money in bank, or place it as a special deposit in some vault or safe. The consensus of public opinion and the almost universal trend of business transactions are in favor of the former proposition, bearing in mind that the funds must be kept separate and apart, and must be put to the proper credit, and be subject to immediate check, and placed in a bank whose reputation is above question, and the deposit made in good faith, and not because of personal benefits or advantages which may accrue to the officer. Our act, making it a felony to receive interest upon money deposited in bank by a public officer, impliedly concedes that it may be deposited in bank. The liability of banks for special deposits is quite limited. If the deposit is for hire, then ordinary care only is required. If no hire or compensation is paid, only slight care is required, and the bank is only liable for gross negligence. 2 Am. & Eng. Enc. Law, pp. 95, 96, and notes. The law allows an officer no compensation to be used in the hiring of a special deposit.

We do not consider a public officer a special bailee, in the sense that he must keep the identical funds which he collects, and pay them out. If this be held, it must necessarily result in much embarrassment and confusion. In the first place, it would necessarily follow that the collector must receive only gold, silver, or such money as is a legal tender, for he could only require those who have demands against the fund to receive such legal tender. Again, he must handle this fund every time it becomes necessary to make a payment out of it, and thus expose it upon every occasion when it is necessary to handle it. It would also follow that he must have it in such shape, denominations, and amounts as would enable him to make the exact change necessary to pay each claimant; otherwise, he would be compelled to mingle other funds with it, and thus destroy its integrity as the original money received. It would prevent the giving of checks, which are so necessary to the prompt and proper despatch of business and keeping of accounts in everyday transactions.

The learned chancellor was of opinion that due caution and diligence were not used by defendant. He says: "In this case the defendant made no personal examination, nor did he have any examination made, as to the solvency of Marr's Bank, nor had the bank officials made any publication for a long while of its condition, as required by its charter. He took the opinion of his friends, whom he confided in; but the opinions given were not based upon any examination or actual knowledge as to the solvency of the bank." Nothing can be predicated, to the prejudice of the defendant, that he did not make or cause to be made a personal examination of the bank. Such an examination, except perhaps by an expert, would have resulted in nothing reliable. Nor would any

bank of standing submit to a personal examination by its customers. The standing of a bank can alone be determined by outsiders, by its mode of doing business and its reputation in business circles. The fact that it did not make the stated publications required by law is a circumstance to be considered, with all others, bearing upon the question of due caution in its selection, and must be considered in connection with the fact that, although the law stood upon the statute books, it had not been observed by state banks. The want of such publication is a failure to comply with the law, but, under the circumstances, not an indication of unsafe condition.

The conclusions to which we come, upon an examination of the entire record, are:

1. That the defendant was not an insurer of the safety of the public funds in his hands, but responsible only for the exercise of good faith, diligence, prudence, and caution, and a disinterested effort to keep and preserve the fund for those entitled.

2. That it was neither negligence nor want of proper business prudence and caution to deposit the funds in a bank of undoubted standing and reputation; and Marr's Bank, at the time of the deposit, had such standing and reputation.

3. The defendant Copeland cannot be considered as a debtor for the funds in his hands, but, on the contrary, had no right to use them in any way, except for the purposes of his trust; and he held them, not strictly as a special bailee, but as a trustee clothed with legal duties and liabilities.

4. The measure of the trustee's liability is fixed by the laws relating to his office, and not merely by the terms of his bond, and there is no unconditional obligation to pay under any and every contingency. The primary object and purpose of this bond are, not to fix or define the limit of his liability, but to superadd to his personal responsibility the security of his bondsmen; and the liability of both principal and sureties under the bond is fixed by the laws relating thereto.

5. The weight of the evidence is that there was no agreement that interest should be paid upon the deposit by Marr, and defendant Copeland was not influenced by this consideration to make the deposit in that bank.

6. The defendant Copeland was justified in not returning the funds to the Livingston Bank, when the president and cashier of that bank suggested that it be done. The proposition made by the president and cashier to induce its return was an illegal one, so far as interest promised was concerned, and was calculated to arouse suspicion as to the condition of the bank. Nor would it have been an act of prudence, under the facts in this record, to return the fund to that bank, in its condition at that time, even though it was secured by the personal indorsement of the president and cashier. The liability of the bank, as well as these officers, was at that time too great to warrant the trustee in putting his funds into their hands, even on the security offered.

7. The decree of the chancellor, in holding the defendant Copeland and his sureties liable for the funds deposited in the Nashville Savings Company, and which were lost by its failure, is erroneous under the facts in this record, and must be *reversed*, and the bill must be dismissed.

WASHINGTON SUPREME COURT.

James C. FAIRCHILD, *Appt.*,
v.
John B. HEDGES, Treasurer of Pierce County, *et al.*, *Respts.*

(.....Wash.....)

The loss of public money by a bank failure will not prevent liability of the county treasurer upon his bond to pay the money as the commissioners shall direct, although he was not negligent in selecting the bank and the county had not provided a suitable and safe place in which to deposit the money.

(February 27, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County in favor of defendants in an action brought to compel defendants to accept certain certificates of receivers of an insolvent bank in settlement of plaintiff's account as former treasurer of said county. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Snell & Bedford,** for appellant:

The various courts have taken two views upon the question of the liability of officers.

Mechem, Pub. Off. § 301.

Since *Marx* v. *Parker*, 9 Wash. 473, that question has been absolutely and finally settled in favor of the less stringent or bailee theory. The line of authorities holding in favor of the bailee theory are:

United States v. *Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89; *Cumberland County* v. *Pennell*, 69 Me. 357, 31 Am. Rep. 284; *People*, *Nash*, v. *Faulkner*, 107 N. Y. 477; *Albany County Supers.* v. *Dorr*, 25 Wend. 440; *York County* v. *Watson*, 15 S. C. 1, 40 Am. Rep. 675; *Wilson* v. *People, Pueblo & A. V. R. Co.*, 19 Colo. 199, 22 L. R. A. 449; *McClure* v. *La Plata County Comrs.* 19 Colo. 122; *State* v. *McFetridge*, 84 Wis. 473, 20 L. R. A. 223; Story, Bailm. 620; Perry, Tr. § 441; *Bridges* v. *Perry*, 14 Vt. 262; *State* v. *Houston*, 78 Ala. 576, 56 Am. Rep. 59; *Odd Fellows Mut. Aid Asso.* v. *James*, 63 Cal. 599, 49 Am. Rep. 107.

Such a deposit is not a loan even though the statute provides that the commissioners shall once a quarter count the money in the hands of the treasurer.

State v. *McFetridge*, *supra*; *Moulton* v. *Mc-*

NOTE.—As to the conflicting authorities on the liability upon an officer's bond for loss of money by bank failure, see Wilson v. People, Pueblo & A. V. R. Co. (Colo.) 22 L. R. A. 449, and *note*; also the case of State, Overton, v. Copeland (Tenn.) *ante*, 844.

See also 31 L. R. A. 844; 33 L. R. A. 461, 585; 34 L. R. A. 678; 40 L. R. A. 690.

Lean, 5 Colo. App. 454; *United States* v. *Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89; *Wilson* v. *People*, *Pueblo & A. V. R. Co.*, *Cumberland County* v. *Pennell*, and *People*, *Nash.* v. *Faulkner*, *supra*; *Tillinghast* v. *Merrill*, 77 Hun, 481; *York County* v. *Watson*, and *Bridges* v. *Perry*, *supra*.

Messrs. **Coiner & Shackleford,** for respondents:

Where a general deposit of money is made in a bank, the title to the money passes to the bank; the relation of debtor and creditor arises between the depositor and the bank.

The only duty of the bank is to pay the depositor a like amount of money upon demand. It is a loan.

Phœnix Bank v. *Risley*, 111 U. S. 125, 28 L. ed. 374; 1 Morse, Banks & Banking, 3d ed. § 289; 2 Am. & Eng. Enc. Law, pp. 93, 94; Story, Bailm. 9th ed. 88; *State* v. *Keim*, 8 Neb. 63.

There is no difference in law between a loan to a banking corporation, copartnership, or company, and a loan to any other kind of a corporation, company, or copartnership, or to an individual.

There is no difference between a deposit with a bank and a deposit with a mercantile firm or copartnership.

Payne v. *Gardiner*, 29 N. Y. 146.

Any use of the public moneys except as authorized by law is unlawful.

Marx v. *Parker*, 9 Wash. 473; *State* v. *Krug*, 12 Wash. 288.

The treasurer is absolutely liable for the moneys entrusted to his care, and must account for and pay over the identical moneys received, or moneys of equal value and amount.

Throop, Pub. Off. 222, 223; *State* v. *Nevin*, 19 Nev. 162; *State* v. *Moore*, 74 Mo. 413, 41 Am. Rep. 323; *Perley* v. *Muskegon County*, 32 Mich. 131, 20 Am. Rep. 637; *Lowry* v. *Polk County*, 51 Iowa, 50, 33 Am. Rep. 114; *Griffin* v. *Mississippi Levee Comrs.* 71 Miss. 767; *Rose* v. *Douglass Twp.* 52 Kan. 451; *Wilson* v. *Wichita County*, 67 Tex. 647; *McKinney* v. *Robinson*, 84 Tex. 489; *Tillinghast* v. *Merrill*, 77 Hun, 481; *Ward* v. *School Dist. No. 15*, 10 Neb. 293; *Nason* v. *Directors of the Poor*, 126 Pa. 445.

Gordon, J., delivered the opinion of the court:

The appellant was, for four years prior to January, 1895, the qualified and acting treasurer of Pierce county, and the respondent Hedges succeeded him as such treasurer. The respondents Holmes, Rogers, and Bartholomew constitute the board of commissioners, and the respondent Gloyd is county auditor of said county. From the record it appears that, during his terms of office as such treasurer, the appellant deposited sums of money coming into his hands as such treasurer in various banks, some of which banks thereafter failed, and this proceeding was instituted by the appellant to compel the respondents to accept, in settlement of appellant's account as treasurer, certain receivers' certificates of insolvent banks. The petition asserts that the deposits were made with the knowledge of the respondents, and in accordance with his business custom; that neither the county of Pierce nor the board of county commissioners of said county provided him with any safe place for keeping the funds; that the safest and surest manner of keeping them was to make a deposit of them in reliable banks of good standing in the community; that the several banks selected by him as places of deposit were of high standing and repute, etc. The lower court sustained respondents' motion to quash the affidavit upon which the application for a writ of mandate was based, and, the relator electing to stand thereon, judgment of dismissal was rendered, from which he appeals. For a better understanding of the nature of the controversy, we quote the following from the opening statement contained in appellant's brief, *viz.*: "The question at issue in this action is narrowed by agreement of parties to the consideration of the one question, to wit: 'Is the county treasurer of Pierce county, Wash., liable personally or upon his bond for money deposited in a bank which afterwards becomes insolvent, in a case where there is no charge of negligence or want of care in any degree against the treasurer, and where it is further admitted that the county has not provided a suitable and safe place in which to deposit the amount of money which may come into the treasurer's hands?'"

Appellant's contentions are: (1) That the treasurer is not the debtor or insurer of the money that comes into his hands, but only the bailee for hire, or trustee of an express trust, who was only responsible for the exercise of good faith and reasonable skill and diligence in the discharge of his trust; and (2) that there is no statutory or constitutional inhibition against depositing such funds in the banks for safe-keeping; that, under the circumstances, it was his duty to so deposit said funds; and that he would be liable for negligence only in selecting such depositories. Section 5, art. 11, of the Constitution of the state, requires that "the legislature shall provide the strict accountability of the said officers [referring to the county officers] for the fees which may be collected, and for all public moneys which may be paid to them, or officially come into their possession." The statute makes it the duty of the county treasurer to receive all moneys due and accruing to the county, and disburse the same in the manner provided by law, and requires him, before entering upon the duties of his office, to give a bond to the county, conditioned, among other things, that "all moneys received by him for the use of the county shall be paid as the commissioners shall from time to time direct, except where special provision is made by law for the payment of such moneys, by order of any court, or otherwise, and for the faithful discharge of his duties." 1 Hill's Code, § 211. An examination of all the authorities has satisfied us that, while such officers are bailees, "they are special bailees, subject to special obligations," and that "it is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility." *United States* v. *Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89. "His liability is to be measured by his bond, and that binds him to pay the money." *Boyden* v. *United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 527.

On this branch of the case, this court, in

Marx v. *Parker*, 9 Wash. 473, after reviewing the authorities bearing upon the proposition, said: "It seems to us that every one of the earlier cases cited, where the expression was used that such and such an officer was not a bailee, or a mere bailee, or was a debtor, must be regarded from the standpoint of the court and the particular case. They were, one and all, cases where suit had been brought upon the bond of the officer, and he was attempting to excuse his default because he had lost the money by robbery, or from some other cause over which he claimed to have had no control. But in every such case it was held that his liability was absolute, and the true reason under *United States* v. *Thomas*, *supra*, must be, not that he was any the less a bailee, but that the statute imposed upon him a measure of duty larger than that found in the common law." We take it that it is fundamental in the law of bailments that the amount of care which the bailee is required to take of the goods or property intrusted to him may be expressly fixed by the contract, and that it is only in the absence of an express agreement that the law presumes it to have been the intention of the parties that a bailee for hire (other than common carriers and the like) is required to exercise only ordinary care, prudence, and caution in the custody and control of the property with which he is intrusted. In the well-considered case of *Pine Island Bd. of Edu.* v. *Jewell*, 44 Minn. 427, the court says: "There is some conflict in the decisions as to the responsibility of public officers and their sureties for the loss of public moneys without negligence or fault on the part of the officers. While in some cases the rule of responsibility of bailees for hire has been applied, exonerating officers who have been found guiltless of negligence, this measure of responsibility is not generally accepted. The great weight of authority in this country will sustain the general propositions, with respect to the liability of such officers and their sureties for the loss of public moneys, that where the statute, in direct terms or from its general tenor, imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed to be absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery; that the rule of the responsibility of bailees for hire is not applicable in such cases; that, where the condition of a bond is that the officer will faithfully discharge the duties of the office, and where the statute, as before stated, imposes the duty of payment or accountability for the money, without condition, the obligors in the bond are subject to the same high degree of responsibility; and that the reasons upon which these propositions rest are to be found both in the unqualified terms of the contract and in considerations of public policy." In *Wilson* v. *Wichita County*, 67 Tex. 647, the court says: "It is too well settled to require discussion that an officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent man would take of his own. He is bound to account for and pay over the public money." In *Rose* v. *Douglass Twp.* 52 Kan. 451, the court says: "By accepting the office of township treasurer, McNabb assumed the duty of receiving and safely keeping the money of the township, and paying it out according to law. He or his sureties are bound to make good any deficiency which might occur in the funds which came under his charge, whether they were lost in the bank or otherwise." In *Griffin* v. *Mississippi Levee Comrs.* 71 Miss 767, it is said: "The idea that the tax collector may make a general deposit of public money in bank, and thereby absolve himself from liability to pay over as he is by law required to do, is so utterly unreasonable as to need no combating. Like all others depositing funds in bank, the tax collector took the risks involved in so doing. The state looks to its officer, and the officer must look to his unreliable or unfaithful banker." In *Nason* v. *Directors of the Poor*, 126 Pa. 445, the court speaking through Chief Justice Paxson says: "The failure of the bank in which the defendant deposited the money is no defense. A receiver of public money, who has given bond for its safe-keeping, is not discharged from liability therefor by the failure of his banker." In *Ward* v. *School Dist. No. 15*, 10 Neb. 293, the court says: "It was Ward's duty, under the law, to keep the money securely. . . . The money was within his control, placed there by force of the statute, and if he saw fit to intrust it to the care of another, he did so at his peril." In *Taylor Dist. Twp.* v. *Morton*, 37 Iowa, 550, the defendant, as township treasurer, had given a bond conditioned (pursuant to the statute) that, "if the said M, as treasurer, shall faithfully and impartially discharge the duties of said office as required by law, then this obligation shall be null," etc. It was held that the defendant was absolutely liable for all moneys coming into his hands, and that he could not plead, as a defense, that the money was, without his fault or negligence, stolen from him, the court saying: "These rules are applicable to all contracts, and the public interests demand that, at this day, when public funds in such vast amounts are committed to the custody of such an immense number of officers, they should not be relaxed when applied to official bonds. A denial of their application in such cases would serve as an invitation to delinquencies which are already so frequent as to cause alarm." In *Com.* v. *Comly*, 3 Pa. 372, Mr. Chief Justice Gibson says: "The keepers of the public moneys, or their sponsors, are to be held strictly to the contract; for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant." In addition to the foregoing, the following cases are to the same effect: *Halbert* v. *State, Martin County Comrs.*, 22 Ind. 125; *State* v. *Moore*, 74 Mo. 413, 41 Am. Rep. 322; *State* v. *Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *New Providence* v. *McEachron*, 33 N. J. L. 339; *State* v. *Clarke*, 73 N. C. 255; *Jefferson County Comrs.* v. *Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *Thompson* v. *Township 16*, 30 Ill. 99; *McKinney* v. *Robinson*, 84 Tex. 489; *Tillinghast* v.

Merrill, 77 Hun, 431; *Baily* v. *Com.* (Pa.) 10 Atl. 764.

We think that, by the great weight of authority upon the question, an officer, such as a county treasurer, under our law, is held to the rule of strict accountability. As is said in *Thompson* v. *Township 16, supra*, "They know well, on assuming their positions, the hazards to which they are exposed, and they voluntarily assume the risks, and are paid for so doing." And if "it appears to be a harsh measure of justice to hold that the treasurer and his sureties are liable, on his official bond, for the money deposited under the circumstances disclosed in the affidavit of defense, and subsequently lost without his fault or negligence, it is impossible to reach any other conclusion without ignoring the authority of well considered cases." *Baily* v. *Com. supra*. We have examined all the cases cited in the able brief of the appellant bearing upon this proposition, but are unable to perceive that they are in conflict with the doctrine above laid down. A single case need only be referred to,—*Law's Estate*, 144 Pa. 499, 14 L. R. A. 103. It was there held that the guardian, who deposited the moneys of his ward in a bank believed by him to be solvent, was not liable for the funds so deposited upon the failure of the bank. We think that the distinction is very clear between the liability and duty of one receiving moneys as a guardian, for the benefit of a private individual, and the liability imposed by statute and by express undertaking upon a public officer as in the case at bar. As to the former, "he is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee. *People, Nash*, v. *Faulkner*, 107 N. Y. 488. The loss in this case was not occasioned by the act of God or a public enemy, and we are not called upon to decide whether, under the circumstances attending such a loss, the officer would be exempt from liability. This conclusion necessarily leads to an affirmance of the judgment entered below, and renders it unnecessary to decide whether a county treasurer may lawfully deposit the funds of his county in a bank or banks.

Affirmed.

Anders, Scott, and **Dunbar, JJ.,** concur.

Hoyt, Ch. J., dissenting:

I am unable to agree with the conclusions of the majority, stated in the foregoing opinion. I think that money coming into the hands of a county treasurer, as such, belongs to the county, and not to the treasurer; that the relation of debtor and creditor is not created. He holds it as trustee for the county, and is only responsible for the exercise of such care in its safe-keeping as is required of a trustee for hire. Under the statute and the obligation which he gives, he is bound to properly discharge the duties of the office, one of which is to exercise due care in safely keeping the funds of the county. But it is a strained construction of such statute and obligation which makes him the guarantor of such safe-keeping. If it is a part of his duty to produce the money regardless of contingencies, he should be allowed to do what he pleases with it until called upon to so produce it. It is unfair and illogical to say that he is personally responsible for the safe-keeping of the money, and at the same time must make only such disposition of it as may be prescribed by the one for whom he holds it. The cases which have held public officers to be guarantors of the safety of funds coming into their hands are mostly from Federal courts, and have been largely induced by the peculiar language of the Federal statutes. To hold that the officer cannot make such disposition of the funds as he thinks proper, and yet must be responsible for its safe keeping, is so illogical and fraught with such hardship upon the officer that I am not willing to follow the cases which have so held. If the relation of debtor and creditor was created by the receipt of the money by the officer, so that he could dispose of it as he pleased, there would be reason in holding him responsible for its safe-keeping; but this would be against public policy. In my opinion all that our statute requires of a county treasurer is either that he should produce the money coming into his hands when required by law, or that he should show that he had exercised the care required of a trustee for hire and that it had been lost without fault on his part. Such has been the holding of the courts under statutes of the same substance as ours, where the bond required was to the same effect. See *Cumberland County* v. *Pennell*, 69 Me. 357, 31 Am. Rep. 284; *Albany County Supers.* v. *Dorr*, 25 Wend. 440; *York County* v. *Watson*, 15 S. C. 1, 40 Am. Rep. 675; *Wilson* v. *People, Pueblo & A. V. R. Co.* 19 Colo. 199, 22 L. R. A. 449; *State* v. *McFetridge*, 84 Wis. 473, 20 L. R. A. 223; *State* v. *Houston*, 78 Ala. 576, 56 Am. Rep. 59. These cases are directly in point, and many others could be cited; also, a large number which, though not deciding the exact question here involved, in principle sustain the contentions of appellant. *United States* v. *Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89; *People, Nash*, v. *Faulkner*, 107 N. Y. 477; *McClure* v. *La Plata County Comrs.* 19 Colo. 122; *Bridges* v. *Perry*, 14 Vt. 262; *Odd Fellows Mut. Aid Asso.* v. *James*, 63 Cal. 598, 49 Am. Rep. 107. See also Story, Bailm. 620, and Perry, Tr. § 441.

Did the appellant exercise such care when he deposited the funds in question, in due course of business, in a bank which, after diligent inquiry, he had reason to believe, and did believe, to be solvent? If what we have said as to the degree of care required of him is the proper measure of his liability, he was discharging his duty as to the fund when he was making such disposition of it as a prudent man would of his own; and, since it is a fact, of which we must take judicial notice, that the most prudent men keep their funds on deposit in such banks, it must follow that, when appellant did this with the funds of the county, he was exercising due care with reference thereto, unless he was prohibited by the statute from thus disposing of them. It may be fairly deduced from the statute that the county treasurer is prohibited from loaning the funds of the county; and if the depositing of the same in a

bank is a loaning, within the meaning of these statutes, the appellant had no right so to deposit the funds in question. That the depositing of money in bank is, for certain purposes, a loaning of it to the bank, so that the relation of debtor and creditor exists in regard thereto, is beyond question; but, in my opinion, to so deposit money is not to loan it, within the meaning of the statute as to the disposition of public funds. The loaning of money in the ordinary sense is a transaction by which, at the instance of the borrower, one parts with his funds for a consideration. A deposit in bank is of a different nature. Money is placed there primarily for other purposes than to secure interest thereon. The primary object is to secure its safe keeping and availability whenever required, and for that reason it is not a loaning, within the ordinary acceptation of the term, and hence not within the provisions of the statutes. And so the courts have held. See *State* v. *McFetridge*, *supra*, and the other cases cited. In my opinion, the appellant was justified in depositing the money of the county in a bank; and if, in the selection of such bank, he used such care as a prudent person would in dealing with his own funds, and only so deposited it in banks which he had reason to believe, and did believe, to be solvent and safe, he should not be held responsible for loss occurring on account of such deposit. In my opinion, the judgment should be reversed.

Albert John ROTH by Guardian *ad Litem*, *Respt.*,
v.
UNION DEPOT COMPANY, *Appt.*

(13 Wash. 525.)

1. **Kicking cars out of sight around a curve on a down grade without any person on them,** in a thickly settled community where it is the custom to use the track as a footpath without objection from the railroad company, where it is known that from 50 to 100 people a day walk upon the track, and the cars are not usually sent this way, is such gross and wilful negligence that the railroad company will be liable for a child killed by a car thus kicked, especially where two of them were kicked on parallel tracks at the same time, although the child had no right to use the track.

2. **A child should not be held to the same degree of care** in avoiding danger while walking on a railroad track as a person of mature years and accumulated experience.

3. **Negligence of a parent** cannot be imputed to a child in an action brought for the benefit of the child, injured by the negligence of another.

4. **A verdict of $15,000** is not excessive for injury to a boy who was run over by a car and one of his legs crushed so that amputation was necessary.

(January 27, 1896.)

NOTE.—For negligence in kicking cars or making flying switches, see *note* to Kentucky C. R. Co. v. Smith (Ky.) 13 L. R. A. 63.

31 L. R. A.

See also 43 L. R. A. 108.

APPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **W. W. Cotton, J. M. Ashton,** and **Lester S. Wilson,** for appellant:

The court erred in admitting evidence that other persons had walked upon the defendant's railway tracks without being molested, for the purpose of showing a license in the plaintiff.

A license cannot be shown solely by this evidence. It must also be shown that the user by the public was such, or the method of use or the means of use were such, that a person of ordinary intelligence would understand that he was authorized to enter thereon.

Kay v. *Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628; *Chenery* v. *Fitchburg R. Co.* 160 Mass. 211, 22 L. R. A. 575; *Carrington* v. *Louisville & N. R. Co.* 88 Ala. 472; *Louisville, N. A. & C. R. Co.* v. *Phillips*, 112 Ind. 59; *Missouri P. R. Co.* v. *Brown* (Tex.) 18 S. W. 670; *Central Railroad* v. *Brinson*, 70 Ga. 207; *Blanchard* v. *Lake Shore & M. R. Co.* 126 Ill. 416; *Glass* v. *Memphis & C. R. Co.* 94 Ala. 581; *Gaynor* v. *Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96.

License cannot be established by mere user.

Baltimore & O. R. Co. v. *State*, 62 Md. 479; *Grethen* v. *Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609; *Philadelphia & R. R. Co.* v. *Hummell*, 44 Pa. 375, 84 Am. Dec. 457; *Wright* v. *Boston & A. R. Co.* 142 Mass. 296.

A person who enters the premises of another under a mere license must take the property as he finds it, and assumes all risks of injury to himself incident to the ordinary use and occupation of the premises by the owner.

Sweeny v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Vanderbeck* v. *Hendry*, 34 N. J. L. 472; *Illinois C. R. Co.* v. *Godfrey*, 71 Ill. 507, 22 Am. Rep. 112; *Pittsburgh, Ft. W. & C. R. Co.* v. *Bingham*, 29 Ohio St. 368; *Davis* v. *Central Cong. Soc.* 129 Mass. 371, 37 Am. Rep. 368; *Benson* v. *Baltimore Traction Co.* 77 Md. 535; *Plummer* v. *Dill*, 156 Mass. 426; *Gibson* v. *Leonard*, 143 Ill. 182, 17 L. R. A. 588; *McAlpin* v. *Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Gramlich* v. *Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Buelow* v. *Chicago, St. P. & K. C. R. Co.* (Iowa) 60 N. W. 617; *Evansville & T. H. R. Co.* v. *Griffin*, 100 Ind. 225, 50 Am. Rep. 783.

The defendant company was under no greater obligation in regard to minors than to adults.

Baltimore & O. R. Co. v. *Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *Philadelphia & R. R. Co.* v. *Hummell*, 44 Pa. 378, 84 Am. Dec. 457.

The verdict is excessive and was due to passion and prejudice.

Ferguson v. *Wisconsin C. R. Co.* 63 Wis. 145; *Missouri P. R. Co.* v. *Dwyer*, 36 Kan. 58; *Massadillo* v. *Nashville & K. R. Co.* 89 Tenn. 661; *Western & A. R. Co.* v. *Young*, 83 Ga. 512.

Messrs. **D. W. Henley** and **Fenton & Saunders** for respondent.

Dunbar, J., delivered the opinion of the court:

The defendant is a railway terminal company in the city of Spokane. Its railway tracks and yards lie parallel with the Spokane river, near its north bank, in that city. North of the defendant company's yards and tracks there is an addition to Spokane city, on which lived, at the time the accident alleged in this case occurred, a number of families, variously estimated in the testimony at from twenty-five to fifty. The railway lines and switches of the appellant ran in a westerly direction across Washington street, at a right angle therewith, and near the north bank of and parallel with the Spokane river, and ran northerly from Washington street, thence in a northwesterly direction, making a short curve around a high bluff of rocks, and thence in a straight line to and beyond the east line of Mill street, of said city, extended north. At a point east of the east line of Mill street, so extended, the appellant had located a switch, from which diverged several side tracks, running parallel with each other, in an easterly direction, around said sharp curve. The railway tracks on the said switches were located on a down grade from Mill street, in an easterly direction, around the said sharp curve; and cars detached from an engine above the switches would, by reason of the down grade, run of their own momentum down to and across Washington street at a rapid speed. For many years before the construction of appellant's yards at this point, the people residing north of the appellant's right of way were in the habit of using several footpaths, which converged into a well defined path as they reached the appellant's right of way near Howard street, and the people residing between Washington street and Mill street were accustomed to go to the south side of the river by these footpaths, which converged into one path near Howard street, and thence directly down the right of way of the appellant to Washington street; and there was also a path leading across the tracks of appellant, running along the north bank of the river to Washington street; but, after the construction of appellant's tracks, the path leading from the tracks along the north bank of the river was abandoned as a footpath, and the people residing north of the tracks, after reaching the tracks, used the right of way of the company until they reached Washington street, it being a more convenient and shorter route to the city than any other way they could travel. It is insisted by the respondent, and the testimony shows without any doubt, that the appellant, and its servants and agents operating their cars at this point, knew of the existence of this footpath, and that the people of all ages residing to the north of the track were accustomed, at almost every hour of the day, to use this footpath and the right of way of appellant from the point where the path entered the right of way to Washington street; that it was not only used by the people who lived north of the tracks, but that it was used indiscriminately. On the 12th day of April, 1892, the plaintiff and respondent, Albert John Roth, a boy of nine years of age, while going down through this path on the right of way of appellant, was knocked down by a car, the wheels of which passed over one of his legs, crushing it so that amputation of that limb became necessary. It seems that the appellant's agents, in switching the cars, sometimes, when help was short, instead of sending an engine down with the empty car, would, in railroad parlance, "kick" the car, and let it go down the track unattended by a brakeman; that it was not the usual way to send the cars unattended by a brakeman, but that they sometimes did so; and it is conceded that that was the manner of switching the cars at the time of this accident. It seems that, at the same time that the respondent, who was in company with his sister and another boy about his own age, came down the path, two cars were "kicked" down the track behind them on appellant's tracks, and the respondent, in order to avoid being injured by one of these cars, started to cross one of the tracks, and in doing so was run over by a car going down the track which he was attempting to cross. By reason of the close proximity of these cars, he became confused, and in attempting to escape from one, was run down by the other. Neither of these cars was attended by any person, but they were "kicked" down, through the cut around the sharp curve, out of sight of the employees who "kicked" them, and they acquired a considerable speed by reason of the down grade of the track. It is conceded that there was no brakeman or any person along the track to look out for the cars, or to warn any person who might be on the track way of danger. The respondent, at the time of the injury, lived with his father and mother, north of the track, and was accustomed daily to go to the south side of the river to sell newspapers to support himself and his family. An action was brought in his interest, by Frank Roth, his guardian *ad litem*, and a verdict was rendered for $15,000 damages. Judgment followed, and an appeal has been taken to this court.

The overwhelming weight of testimony is to the effect that, for three or four years immediately preceding this action, it had been the custom of the people north of the track, and of others, to use this right of way as a footpath; that from 50 to 100 people passed over it daily; that this custom was known to the appellant; that it made no objection to it; and that it posted no notices warning people not to travel upon the path. There was some little testimony offered in defense to the effect that people had been told not to go through there, but this was a question of fact which was submitted to the jury, and, under the testimony, they were amply justified in coming to the conclusion that the travel was as alleged by the respondent. This condition of things was testified to, not only by numerous citizens, but by many of the employees of the company, or men who were employees during that time. One witness testified, "They used it just about the same as you would a sidewalk;" another, that persons traveling over this route could be seen every hour in the day. Witness L. N. Davis, who had worked for the company, and who lived in that neighborhood, testified, "Well, there is people, most all the time you would look out, traveling; especially at train time you would see them, all kinds of ways, going; see them taking little wagons, hauling;

trunks through there, and baby carriages, and everything." This witness testified that that was the main pathway of all the people north of the track. So that the essential question in this case is, Was the respondent a licensee or a trespasser at the time he was traveling on the appellant's right of way, or does an acquiescence by a railway company in travel on its right of way imply a license? for it is an admitted fact in this case that the respondent was not there by special invitation of the appellant, that he was not there for the benefit of the appellant, but that he was there simply for his own convenience and pleasure. A number of cases are cited by the appellant to sustain the contention that, notwithstanding the fact that a railroad company acquiesces in such travel by the public, and does not take any steps to stop them, no implied consent to such use is established, and that such acquiescence does not vary the company's duties as to trespassers; and it may be conceded at the outset that a railroad company does not owe any duty to a trespasser, for there is no presumption that a trespasser, or a person without consent, actual or implied, will be upon the track.

We have carefully examined the cases cited by the appellant, and a majority of them we think can be easily distinguished from the case at bar. The case of *Chenery* v. *Fitchburg R. Co.* 160 Mass. 211, 22 L. R. A. 575, was an action for running down the plaintiff at a point on defendant's track where it was crossed by a private way, along which she was traveling. The court instructed the jury that, as a matter of law, if people were accustomed to cross a railroad track at a certain place, and the company made no objection, license from the company was implied, and that such a license imposed a duty to use reasonable care to protect the crossers; and the court in that case simply held that this was a question of fact for the jury to determine. *Louisville, N. A. & C. R. Co.* v. *Phillips*, 112 Ind. 59, was a case where a track was laid upon a public street, and the court held that the rights of the public and the railroad company respecting the use thereof were mutual, though those of the latter were paramount; that a person was not a trespasser who walked along such track, and if in so doing his foot became fastened in an opening which existed by reason of the negligent construction of the track, and he was run upon by a train of the railroad company which was negligently managed, he being without fault, the railroad company was liable for the injury sustained. This was what was decided in this case, though the court indulged in a general discussion of the subject involved in the present case, and said that, on the hypothesis that the place where the person received his injury was exclusively the roadway of the company, something must be superadded to the negligence of those in charge of the train in order to justify a recovery, and that a trespasser had no right to exact care from a railroad company. The question of license or acquiescence did not arise in that case, and was not discussed, and we can see nothing in the case, either of *dicta* or decision, which bears upon the case at bar. In *Missouri P. R. Co.* v. *Brown* (Tex.) 18 S. W. 670, the court held that evidence that a person had been in the habit of traveling on a track, and that the engineer had seen persons on that part of the track, but no more frequently than on other parts of the track similarly situated, and that no measures had been taken to prevent such use of the track, was not sufficient to establish a license to the public to use the track. In that case the locality was remote from any station, and the court especially announced in its decision this fact, and the further fact that there was nothing in the facts of the case to show that the company assented to or knew of the use of the track by others, and that the facts of that particular case were not sufficient to establish an implied consent to the use of the track on which a license could be assumed to have existed, and the further fact that there was nothing in the testimony to show any acts of negligence on the part of the appellants, but, on the contrary, that it showed an entire absence of negligence,—a different case from the one under discussion, where the track was in a thickly settled locality, and where a uniform travel by the public had been established for a period of from three to four years. Persons are seen, not infrequently, by engineers, traveling on tracks in country places, and in districts where frequent travel is necessarily impossible; and, of course, the knowledge that a person occasionally traveled upon a track in such a place as that would not be sufficient to establish a license to the public generally, and that is all that was decided in that case. *Central Railroad* v. *Brinson*, 10 Ga. 207, seems to be a miscitation, as the case is not reported in that volume [70 Ga. 207]. *Gaynor* v. *Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96, simply decides that this is a question for the decision of the jury. In the case of *Philadelphia & R. R. Co.* v. *Hummell*, 44 Pa. 375, 84 Am. Dec. 457, there is no question of license or acquiescence discussed. The court held, in rather rabid language, that there was an intrusion upon the rights of the railway company; that the company had no reason to suppose that either man, woman, or child might be upon the railroad where the accident happened; that it had a right to presume that no one would be upon it, and to act upon the presumption. The main contention there was that the company did not blow the whistle of the locomotive. The court held that they were not bound, under the circumstances of that case, to do so. But this case is mentioned and distinguished by other subsequent cases in Pennsylvania, which hold that a license could be established by acquiescence. *Davis* v. *Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368, was a case where a woman had been invited to attend a meeting held at a house of worship, and was injured by reason of the dangerous condition of the society's premises; and the court held that whether the plaintiff was in the exercise of due care, or whether the way was reasonably safe, were questions of fact for the jury. The case in no way bears upon the case under discussion. *Benson* v. *Baltimore Traction Co.* 77 Md. 535, was a case where the principal of a school had asked permission for a class of students to visit the company's power house, for the purpose of viewing the machinery; and in passing through the power house one of the students fell into a vat of boiling water, and it was there very properly held

that the traction company was under no obligation to especially provide against accidents. The court in its discussion of the question quotes the case of *Hounsell* v. *Smyth*, 7 C. B. N. S. 738, which case is quoted in several subsequent cases, where the court said, "Suppose the owner of land near the sea gives another leave to walk on the edge of the cliffs,—surely, it would be absurd to contend that such permission cast upon the former the burden of fencing." But this case can have no bearing upon the question discussed here. It certainly would not impose the burden of fencing; but if, after he had given a person permission to walk on the edge of the cliffs where there was a single path, and no way of escape from it accessible, he had sent a blind car down the path after him, a different liability might reasonably have been established. *Plummer* v. *Dill*, 156 Mass. 426, decided that where a woman went to a building for her own convenience to inquire about a matter which concerned herself alone, she could not recover from the owner of the building for injuries received by striking her head upon a projecting sign placed on a post at the corner of the landing. This case seems to us clearly not to be in point. *Gibson* v. *Leonard*, 143 Ill. 182, 17 L. R. A. 588, was a case where the members of a fire patrol forced open the door of a building then on fire, and entered the main floor and basement; and, while using an elevator, the rope broke, and one of the patrolmen was injured. The owner of the building was not present, and did nothing to induce the entry. The court held that the owner of the building was not liable to the party injured, although the elevator and its appliances were not safely constructed and maintained. The court in its opinion says: "There is nothing in the case to indicate an invitation, either express or implied, to either enter the premises or use the elevator, and, there being no invitation or inducement on the part of appellee, no duty was imposed upon him to leave the elevator in such condition, when the building was closed at night, as that it could be operated with safety." It would seem that it would be stretching the law to hold that the owner of a building would reasonably contemplate an emergency such as the burning of the house, and that, by reason of the contemplation of such emergency, he should be held to have invited the patrolmen to use a dangerous appliance. The case of *Baltimore & O. R. Co.* v. *Schwindling*, 101 Pa. 258, 47 Am. Rep. 706, involves no question of license. The case of *Wright* v. *Boston & A. R. Co.* 142 Mass. 296, may tend to support the contention of the appellant, though it does not very clearly appear from the opinion what the real circumstances of the case were, or what the court would have held under the circumstances of this case. The case of *Illinois C. R. Co.* v. *Godfrey*, 71 Ill. 500, 22 Am. Rep. 112, seems to decide squarely in favor of the appellant's contention that the simple acquiescence of a railroad company in the use of its track or right of way, by persons passing along it, as a footway, does not give such person a right of way over the track, and does not impose upon the company the duty of protecting or providing safeguards for persons so using its grounds; and this case was followed by the the supreme court of Illinois in the case of *Blanchard* v. *Lake Shore & M. R. Co.* 126 Ill. 416, and the supreme court of Maryland in the case of *Baltimore & O. R. Co.* v. *State, Allison*, reported in 62 Md. 479. These cases hold that the relative rights of the railroad company and the injured party are not changed by reason of the acquiescence on the part of the company in the use of its track or right of way, and it follows from the logic of the cases that the company would be held responsible only for such gross negligence as indicated wilfulness. The case in 71 Ill. 500, cites in support of its conclusion the case of *Philadelphia & R. R. Co.* v. *Hummell*, *supra*, and *Gillis* v. *Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317. We think the Illinois supreme court mistook the logic of those cases; and such was the opinion of the supreme court of Pennsylvania, which reviewed the *Hummell* and *Gillis Cases* in the case of *Kay* v. *Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628, and in some subsequent cases, and distinguished them from a case where license by user had been established.

Probably the strongest case supporting the views contended for by the appellant is the case of *Glass* v. *Memphis & C. R. Co.* reported in 94 Ala. 581, where it was held that the fact that persons living in the neighborhood of a railroad track are accustomed to walk upon the track without objection of the company does not make them any the less trespassers; that, where such track is used without the direct consent of the company, the company could be held only for negligence amounting to wantonness or an intention to inflict injury; and further held that such wantonness and intention could not be inferred unless the employees actually knew of the peril of the decedent, and failed to make reasonable effort to avert it. We think that all the cases cited can be distinguished, possibly, from the case at bar, so far as the doctrines announced are concerned, excepting this one; and this court, we think, went too far in holding that wantonness could not be inferred unless the peril of the decedent was actually known to the employees of the company. Conceding, for the moment, the doctrine that the plaintiff in this case was a trespasser, and conceding, further, that the defendant could be held only for gross negligence, we think the circumstances of this case did most emphatically indicate gross negligence; and we are of the opinion that, under the circumstances of the case, the defendant ought to be held to have presumed that when it threw a car out of its sight around a curve, on a down grade, in a thickly settled community, where it had knowledge that its track was used by from 50 to 100 people a day, somebody's life would be imperiled by this careless mode of switching its cars, and that it carelessly and wantonly placed itself in a position where it could not see the peril of the passers-by. The evidence shows that it was not its general custom to switch its cars in this way, but that it did so only occasionally, when short of men. The rule as laid down by many writers is that such a duty is imposed upon a railroad company in operating its trains as would be imposed upon an honest man in the transaction of his business. It seems to us that

no honest or humane person would be guilty of transacting his business in the reckless manner in which the appellant in this case transacted its. Duties are relative, and that which would not be a duty under certain conditions would become a most imperative duty under others. The people of modern times hold life and limb in too high regard to allow them to be weighed in the scale with mere convenience or selfish property interests. This is the sentiment of humanity, and a sentiment which ought to be reflected by the decisions of the courts. This appellant, to save the expense of an employee for a few minutes, hurled not only one, but two, blind cars down this right of way, regardless of the fact, which it must have known, under the circumstances, as shown by the testimony, that they were liable to cause the death or permanent injury of some one; and we think that this fact alone establishes gross and wilful negligence, notwithstanding the fact that none of the employees saw the danger of the plaintiff in this case; and, of course, under all the authorities, a railroad company is not allowed to run down and destroy a naked trespasser who is upon its track, but is held to be responsible for an attempt to prevent his injury after his peril is discovered. Very much more in accordance with the plainest principles of humanity was the doctrine announced in *South & North Ala. R. Co.* v. *Donovan*, 84 Ala. 141, *viz.*, that those who are operating a railroad in a town or city, or through a thickly populated district, where there is occasion for people to pass along the track, and a usage to that effect, owe the duty of keeping a vigilant lookout for such persons at such places. See also *Glass* v. *Memphis & C. R. Co. supra*. The two Illinois cases which we have just noticed seem to have lost sight of the doctrine of comparative negligence, which was announced by the supreme court of Illinois in the case of *Illinois C. R. Co.* v. *Hammer*, 72 Ill. 347, and the opinion in 71 Ill. 500, *supra*, must be construed somewhat with reference to the principles enunciated in the later case, where it was held that, while it was negligence for a person to travel on the track of a railroad at its depot grounds, where everybody had notice that cars were constantly passing and engines switching cars, it was also negligence on the part of the company to have flying switches passing on a track, without an engine attached or a bell ringing or a whistle sounding; and, where both parties were at fault in these respects, it was for the jury to determine, under all the circumstances, whether the negligence of the plaintiff was slight and that of the defendant gross; and, if the negligence of the plaintiff was slight and that of the defendant gross, that the plaintiff could recover. The court in that case announced that the rule had not been at all times accurately stated, and that, inadvertently, courts had laid down the rule that a plaintiff who was guilty of negligence could not recover, but that the true rule was that he could recover, notwithstanding his negligence, if his negligence had been slight and that of the defendant gross; that where persons go upon or pass over the grounds connected with railroad depots, they are presumed to know that the place is dangerous, and hence are required to use care and prudence commensurate with the known dangers of the place; but that, on the other hand, the servants of the company knowing that it is a place where persons are constantly passing, their duty to exercise caution and prudence is also enhanced. "In such places," says the court, "they must use more effort and precaution for the preservation of life and limb than at places where persons have no right to be and the employees have no right to expect to find them. While the great commercial and business interests of the country demand their protection, still the lives and personal safety of persons are paramount. All other considerations must yield to this, the first and greatest and most important of all rights, for which governments are organized and laws enacted." The court does not stop with the announcement that they must use more effort for the preservation of life and limb at such places than at places where persons have no right to be, but coupled with that is the further provision that they must use more precaution than at places where they have no right to expect to find persons. In the case at bar they did have a right to expect to find people on this track, where these two insensate objects were sent, without control, notwithstanding the fact that people had no legal right to be there.

In opposition to the doctrine announced by these few cases, however, we cite, first, the case of *Kay* v. *Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628, where it was held directly that the company had the right to detach cars and send them on, without a brakeman, out of sight around a curve, but that this would be different when, by license to others and by sufferance, they permitted the public to enjoy a privilege of passage which would bring them into danger. It is true that in this case certain privileges were granted over the right of way to certain persons, for the purpose of unloading and shipping lumber, but this privilege was not granted to the plaintiff nor to the public in general, and cannot affect the principles announced in the decision. This was a case where a woman carried her nineteen months old child with her to where she went to wash, near the railroad track. After having crossed over the track to get some water she set the child down before a chair, and engaged again in washing. In three or four minutes she missed the child. It had strayed upon the track and was run over by a lumber car, which was detached and sent around a curve in the siding, on a slight down grade, unattended by a brakeman. Both of the child's arms were so crushed that they had to be amputated. "Conceding the right of the railroad company," said the court, "to the exclusive use of its tracks over the lot, . . . the true question is whether the circumstances created a different duty. The ownership of the lot gave to the company the right to use it as most convenient and expedient in moving its cars; and no one can gainsay the right to detach and send cars ahead without a brakeman, even out of sight and around a curve. But the case is altered when, by a license to others, they have devoted this ownership to a use involving their interests and their safety, and, by sufferance, permitted the public to enjoy a privilege of passage which might bring their persons into

danger." The court then, after noticing the fact that the way was used to unload lumber, proceeds to say: "It also suffered its track to be used by a neighboring population as a way across the lot from one part of the city to another. . . . The presumption of a clear track at this place could not reasonably arise, . . . but greater precaution against injury to those thus permitted to use the lot and the tracks of the company became a duty." And, in speaking of the negligence in sending the car round the curve where people were liable to pass, the court said: "Its only purpose was to save a few hundred feet of travel to the engine, by detaching it from the car when in motion, and stopping the engine before it reached the switch, in order to permit it to run forward on the main track to hitch onto other cars. To save this short time and distance a life was periled and a serious injury inflicted." And the court, as we have before indicated, in reviewing the instructions of the court below, who relied upon the cases of *Philadelphia & R. R. Co.* v. *Hummell*, 44 Pa. 375, 84 Am. Dec. 457, and *Gillis* v. *Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317, distinguished those cases from the case then under consideration, and found that the trial court had erred in applying the principles enunciated in those cases to the case at bar, and, in quoting from the language of the court in the *Hummell Case*, this expression, "precaution is a duty only so far as there is reason for apprehension," says that that is the very feature which distinguished that case from the case under discussion. So, in this case, accepting that maxim, that "precaution is a duty only so far as there is reason for apprehension," and applying it to the circumstances of this case, it must be convincing to the mind of every reasonable person that there was reason for apprehension that a car, thrown around this curve, unattended, under the circumstances of the travel proved, would do incalculable damage to some traveler. *Hooker* v. *Chicago, M. & St. P. R. Co.* 76 Wis. 542, was a case where a woman was walking across a high trestle, accompanied by two children. It was conceded that she was not there in the interest or for the benefit of the railroad company, but that she was there simply for the purpose of amusing and entertaining the children, and that they had to walk across this bridge or trestle on ties. While on the bridge they were overtaken by a passing train and were all killed. The testimony tended to prove that the bridge, for many years and up to the time of the accident, had been habitually and constantly used by men, women, and children, going back and forth through that part of the city, as a foot pathway, without any objection or warning by the company that it should not be so used, until after the accident. The court held that by reason of said acquiescence in the travel of the public, Mrs. Dacey, who was using the bridge with the children, was not a trespasser, that she was using it properly and lawfully, and that the defendant should be held to the ordinary rule of negligence. In *Swift* v. *Staten Island Rapid Transit R. Co.* 123 N. Y. 645, a New York case, it was held that the acquiescence of a railroad company in the habit of certain persons crossing its track at a place not a public highway amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury; that the sufficiency of the warning required at such crossings is a question for the jury. The court, in the course of its opinion, says: "The legal principles applicable to the facts appearing here have been frequently enunciated by this court, to the effect that where the public have, for a long time, notoriously and constantly, been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury." It will be noticed that in these last two cases there is no question of any affirmative action on the part of the companies in granting licenses to people who travel on their tracks, but the decisions were based squarely upon the doctrine of acquiescence. In the case of *Troy* v. *Cape Fear & Y. V. R. Co.* 99 N. C. 298, the same principle was decided, and the court there, in discussing the proposition, and noting the contention of the defendant that the plaintiff's intestate was a trespasser in being wrongfully on the track, and that the injury was the result of his own wrong,—in which case *State, Bacon*, v. *Baltimore & P. R. Co.* 58 Md. 482, was cited,—said: "We think that upon a careful examination of the cases cited by counsel for the appellant, it will be found that in the most of them the injury was the result of the contributory negligence of the party injured, proximately causing it, and not resulting directly from the negligence of the defendant, and where they have gone beyond this, they are not in accord with the rulings of this court, nor in harmony with the current of authority,"—citing *Byrne* v. *New York C. & H. R. R. Co.* 104 N. Y. 362, 58 Am. Rep. 512, where it was said that "where the public for a series of years had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to all persons to cross at that point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains so as to protect them from injury." To the same effect are: *Kelly* v. *Southern Minn. R. Co.* 28 Minn. 98; *Barry* v. *New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Philadelphia & R. R. Co.* v. *Troutman*, 11 W. N. C. 453; *Taylor* v. *Delaware & H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446. In the last-mentioned case the court, quoting from *Barry* v. *New York C. & H. R. R. Co. supra*, said: "The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but so long as it permitted the public use it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. . . . The company is an actor at the time in creating the

circumstances which imperil human life, and it would be an alarming doctrine that it was under no duty to exercise any care in the movement of its trains." See also *Delaney* v. *Milwaukee & St. P. R. Co.* 33 Wis. 67; *Davis* v. *Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 676; *Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Barry* v. *New York C. & H. R. R. Co. supra.*

In fact, the overwhelming weight of authority seems to be to the effect that acquiescence creates a right which imposes upon the railroad companies the duty of ordinary diligence; and, as the instructions of the court on this proposition were all based upon this theory, and the objections to such instructions were based upon the opposite theory, it is not necessary to specifically review them. It is sufficient to say that we think the instructions were given in accordance with the great weight of authority.

And the instruction in regard to contributory negligence, we think, was also properly given. By the overwhelming weight of authority, a distinction is made between the responsibility of a child and that of an adult. It seems to us that it would be a monstrous doctrine to hold that a child of inexperience—and experience can come only with years—should be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience. In the simplest transactions of life we recognize this distinction. It is recognized by the law in all of the turntable cases. It was recognized by this court in the case of *Ilwaco R. & Nav. Co.* v. *Hedrick*, 1 Wash. 446, where it was held that the testimony of the company that it had been in the habit of leaving the turntables unlocked (in an action against such company for the death of a child of tender years) was not admissible. No court would hold that an adult who would deliberately put his feet down between the wall and a turntable when it was in motion, so that they would be ground off, was not guilty of contributory negligence. His experience would naturally teach him better. But everybody, and especially people who are employing dangerous agencies, must deal with children just as they are, and must take notice of their lack of judgment and lack of experience. The care or caution required is according to the capacity of the child, and this is to be determined, ordinarily, by the age of the child. In the case of *Mowrey* v. *Central City Railway Co.* 51 N. Y. 666, the court said: "The old, the lame, the infirm, or the young are entitled to have their condition and ability, mental and physical, considered in diminution of the degree of care exacted of them." The rule is, however, laid down by Shearman & Redfield on Negligence, § 73, as follows: "It is now settled by the overwhelming weight of authority, that a child is held, so far as he is personally concerned, only to the exercise of such degree of discretion as is reasonably to be expected from children of his age." Another point made by the appellant is that it was not allowed to show that the accident was caused by the negligence of the parent. This being an action brought for the benefit of the child, and not for the benefit of the parent, the negligence of the parent cannot be imputed to the child. The only remaining question is as to the amount of the judgment recovered. It is contended by the appellant that the amount of the verdict is excessive, showing prejudice and passion on the part of the jury. We are not willing to say that $15,000 will more than recompense the plaintiff for hobbling through life maimed and disfigured. We are aware that many courts have held, in similar cases, that the amount of this verdict was excessive, but we think it probable that if such injuries had happened to the judges themselves, or to members of their families, their views as to excessive damages would have undergone a radical change.

The judgment will be affirmed.

Scott and **Gordon**, JJ., concur.

Hoyt, Ch. J., dissenting:

I feel compelled to dissent from what is said in the foregoing opinion as to the effect of the railroad company's allowing, if it did allow, persons to travel along and across its right of way. In my opinion, railroad companies occupy the same relation to the real estate which they own as other owners of such property. The general rule that an owner of uninclosed real estate will lose no rights by reason of the fact that he allows a path to be made across it without objection on his part is too well settled to require the citation of authorities in its support. The plaintiff's own evidence in the case at bar showed that the right of way of the appellant, along and across which persons had been accustomed to pass, was open to the common and entirely uninclosed. Hence, under the general rule above stated, the railroad company could lose no rights by reason of persons having been allowed to travel upon it, even if it was shown that the highest officers of the company had full knowledge of their custom so to do. Upon the other questions discussed, I express no opinion.

CALIFORNIA SUPREME COURT (Department 1).

Vincent P. BUCKLEY, *Appt.*,
v.
Giles H. GRAY, *Respt.*

(110 Cal. 339.)

1. An attorney is not liable to a son for even gross negligence in so drawing the will of the mother as not to carry out her desires in the disposition of her property, even though the son suffers great pecuniary loss thereby, there having been no privity of contract between the son and the attorney.

2. The employment of an attorney by a mother to draw her will, in which a provision was made for one of her sons, is not a contract made for the benefit of the latter, within Civ. Code, § 1559, providing that a third person may enforce a contract entered into between others for his benefit, so as to entitle such son to recover from the attorney for his gross mistake in so writing the will as to deprive the son of the provision designed by the testator for his benefit.

(December 10, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for Sonoma County in favor of defendant in an action brought to recover damages for defendant's negligence in drawing a will contrary to the instructions of the maker, the result of which was to deprive plaintiff of property intended for him. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Blake, Williams,** and **Harrison** for appellant.

Messrs. **Haven & Haven** for respondent.

Van Fleet, J., delivered the opinion of the court:

Action to recover for negligence of attorney in drafting and executing a will. The court below sustained a demurrer to the complaint, and, plaintiff failing to amend, judgment was entered against him, from which he appeals. The complaint alleges, in substance, that on October 5, 1883, defendant, an attorney at law, was employed by Mrs. C. M. A. Buckley, the mother of plaintiff, to draw her will, which she desired and directed to be so drawn as to leave all the residue of her estate, after certain specific legacies, to her two sons, then living, the plaintiff and one John P. Buckley, to the exclusion of the children of a deceased son of the testatrix; that in pursuance of such employment defendant on said day drew a will for said testatrix, and superintended and directed the execution thereof; that in the preparation of said will, and in directing the execution thereof, the defendant was guilty of gross carelessness and negligence in the performance of his professional duties, in this: that said will was so drawn as not to legally express the desires or direction of the testatrix as to the exclusion of said grandchildren, but in such manner that the latter were permitted under the will to take of her estate; and that in directing the execution of said will this plaintiff, although named in said will as one of the devisees thereunder, was caused by the defendant to become one of the subscribing witnesses thereto, thereby rendering the provisions of said will as to the plaintiff void. It is further alleged that said John P. Buckley died before the testatrix; that thereafter, in May, 1891, said testratrix died without having revoked or altered said will; that the will was admitted to probate, and the estate of said testatrix duly administered; and that under the decree of distribution said grandchildren received one-half of said estate, amounting to $85,000, in which amount plaintiff alleges himself damaged, and for which he asks judgment against defendant.

We think the demurrer was properly sustained. In our judgment the complaint clearly fails to state a cause of action against defendant in favor of the plaintiff. It is to be observed that the action is not by the client, but by a third party, her son. It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone,—that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act, to the injury of another, is liable therefor without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enters into the transaction, the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter. 2 Shearm. & Redf. Neg. §§ 562, 574; *National Sav. Bank* v. *Ward*, 100 U. S. 195, 25 L. ed. 621, and cases therein cited; *Roddy* v. *Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, and cases cited. In *National Sav. Bank* v. *Ward*, *supra*, the general rule above adverted to is exhaustively discussed, and its limitations stated by Mr. Justice Clifford, for the court. That was a case where a third party sought to maintain an action against the attorney for damages resulting to him from relying upon the correctness of a defective certificate of title to a piece of real estate furnished by the attorney to a client, upon the faith of which the plaintiff had loaned money on the property. In holding that the plaintiff could not maintain the action, it is there said: "Beyond all doubt, the general rule is that the obligation of the attorney is to his client, and not to a third party, and, unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained.

NOTE.—As to right of action on a contract by a third person for whose benefit it was made, see *note* to Jefferson v. Asch (Minn.) 25 L. R. A. 257.

Shearm. & Redf. Neg. § 215. Conclusive support to that rule is found in several cases of high authority. *Fish* v. *Kelly*, 17 C. B. N. S. 194." And after commenting upon the case of *Fish* v. *Kelly*, and the case of *Robertson* v. *Fleming*, 4 Macq. H. L. Cas. 167, 209,—from the latter of which cases Lord Wensleydale is quoted as saying that "he only, who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms,"—the learned justice proceeds: "Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, 'the limit of the doctrine relating to actionable negligence,' says Beasley, Ch. J., 'is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligence of men could be followed down the chain of results to the final effect.' *Kahl* v. *Love*, 37 N. J. L. 5, 8. . . . Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and Parke, B., very properly admits in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. *Longmeid* v. *Holliday*, 6 Exch. 761–767. Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. 'These cases,' says the court in that opinion, 'occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made;' and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskilfully treated by a surgeon, where both would be liable to the injured party, even if the father or friend of the patient contracted with the wrongdoer." In *Roddy* v. *Missouri P. R. Co. supra*, it is said: "The right of a third party to maintain an action for injuries resulting from a breach of a contract between two contracting parties has been denied by the overwhelming weight of authority of the state and Federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume," citing *Winterbottom* v. *Wright*, 10 Mees. & W. 109, and a large number of other cases. "The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in *Winterbottom* v. *Wright*, 10 Mees. & W. 109, as follows: 'If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty.' The other ground is thus stated in the New Jersey case above cited: 'The object of parties in inserting in their contracts specific undertakings with respect to the work to be done is to create an obligation *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts.' Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them."

No authority has been brought to our notice contravening the rule as stated in the foregoing citations. Some, which at first glance might be so taken, will be found upon analysis to fall within one or the other of the exceptions noted, and not to infringe upon the general doctrine. Within such class fall the cases relied upon by plaintiff to support his general right to maintain the action. This case comes strictly within the general doctrine as above stated. No fact is alleged bringing it within any of the exceptions thereto. It is not alleged that defendant did the act charged maliciously, or through any evil intent, or with any fraudulent purpose, or that he did it in any affirmative sense. The complaint proceeds solely upon the theory that it was through negligence arising either from ignorance or carelessness, or both; and this, although it may be conceded that the complaint discloses an instance of the grossest ignorance on the one hand, or unpardonable carelessness on the other, and shows very grievous injury to plaintiff as a result, does not, within the principles above announced, make a case entitling the plaintiff to maintain the action. It is claimed, however, that the action can be maintained under the rule, expressed in § 1559 of our Civil Code, that a contract made by one person with another for the benefit of a third person may be enforced by the latter, the argument being that the employment of defendant by plaintiff's mother to draw her will was clearly for plaintiff's benefit, inasmuch as the latter was one of the objects of her bounty, as expressed in her will; and a number of cases are cited which are supposed to bring the case within that rule. But, in our judgment, that provision has no application to this case. It is intended to apply to instances where the contract is made expressly for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as a result of such contract. Such is the language of the Code, and such will be found to be the application of the doctrine in all the cases cited by counsel, or which have

come to our attention. The terms of § 1559 are: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." This rule, we are told by Mr. Pomeroy (Rem. & Rem. Rights, § 139), was originally adopted prior to the reformed procedure, being based partly upon considerations of convenience and partly upon a liberal construction of the nature of the contract, and the purpose of which was to avoid circuity of action, and to enable the real party in interest to sue. That author proceeds to give us illustrations of its application, and each instance given is a case where the contract was in express terms made for the benefit of the third party, and by reason of which the latter became the real party in interest. No such application of the doctrine as is here contended for is even remotely hinted at. The contract between the plaintiff's mother and the defendant, which was the subject of the breach, cannot be said in any legal sense to have been expressly made for plaintiff's benefit. It was a contract for employment of defendant's services as an attorney, to draft the will of Mrs. Buckley, the immediate purpose of which was for the benefit of the latter, to enable her to make disposition of her estate in accordance with her desire. Remotely, it is true, she intended plaintiff to be benefited as a result of such contract, by providing for him in her will. Such provision, however, could create no vested right in plaintiff until the death of the testatrix. Until that event the will remained purely ambulatory, and the provision for plaintiff could be at any time changed or withdrawn. It therefore created a mere possibility in plaintiff,—not a right which made him in law a privy to the contract. To hold that, by reason of the provision for plaintiff in the will, the contract is to be considered one made expressly for his benefit, is to confound the terms of the will with those of the contract. The latter alone was the subject of the breach, and by defendant's negligence in carrying out that contract the testatrix alone suffered legal injury. Although the ultimate consequential injury to plaintiff would appear to have been great, it was, so far as defendant is concerned, *damnum absque injuria*, against which the courts are powerless to relieve. In this view, it is not material to notice the other objections made to the complaint. The demurrer having been properly sustained, it follows that *the judgment should be affirmed*. It is so ordered.

Garoutte and **Harrison, JJ.**, concur.

END OF CASES IN BOOK 31.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1895, Classified as Follows:

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
II. CONTRACTUAL AND COMMERCIAL RELATIONS.
III. CORPORATIONS AND ASSOCIATIONS.
IV. DOMESTIC RELATIONS.
V. PERSONAL RIGHTS.
VI. TORTS; NEGLIGENCE; INJURIES.
VII. PROPERTY RIGHTS.
VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Constitutional amendment.

The adoption of a proposed constitutional amendment is discussed in various phases in a case which holds that a proposal to change the location of the seat of state government is not invalidated by making the change conditional on donations and the erection of buildings in addition to a vote of the people, although the existing Constitution requires such vote only. (Mo.) 815.

Unreasonable seizures.

The taking as exhibits on a criminal prosecution for causing the explosion of a boiler the boiler, engine, and other materials, although done under order of court, is held to be a violation of the constitutional protection against unreasonable seizures. (Mich.) 163.

Due process of law.

The constitutional requirement of due process of law is held to be violated by a statute providing for assessments on property without any notice to lot owners or opportunity to be heard. (Va.) 382.

Due process of law is held to be denied by a statute making the issue of improvement bonds which could be done without notice to the owners of property affected, within forty days after the assessment, conclusive of its validity. (Wis.) 213.

The owner of hogs is not deprived of property without due process of law by making it unlawful to allow them to run at large. (W. Va.) 131.

The right of a municipal corporation, such as an incorporated school district, to the protection of a constitutional provision as to due process of law against a statute attempting to take away a complete defense under the statute of limitations, is established in an Illinois case. (Ill.) 71.

A statute requiring railroad companies to carry freight for the same rates that any other company may carry it between the same points, without providing for any investigation of the matter, is held to be a denial of due process of law. (Neb.) 47.

Sunday.

The constitutionality of the statute prohibiting barbers to carry on business on Sunday except in two places within the state is sustained as an exercise of the police power to protect health. (N. Y.) 689.

Delegation of power.

The unconstitutionality of a statute attempting to delegate legislative power to an insurance commissioner by authorizing him to adopt a standard policy is declared in Wisconsin, following Minnesota and Pennsylvania decisions. (Wis.) 112.

Eminent domain.

Land owned by a railroad company but not actually in use or necessary for the enjoyment of its franchise is held subject to condemnation by another railroad company for whose use it is necessary. (Mont.) 298.

Voting.

A statute making it a crime to vote without certain documentary proof of the payment of a poll tax, or the voter's affidavit of such payment and of the fact that the required document has been lost or mislaid, is held valid, even as against a voter who has actually paid his poll tax. (Tenn.) 837.

The right of the mayor to vote in the election of an officer by the city council, of which he is declared to be a member, is limited to the case of a casting vote to break a tie, where the charter in general terms says that he shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote. (Me.) 116.

Taxes.

A mistake as to the location of lands whereby taxes are paid to a school district which has no right to them is held to give no right to recover back the taxes paid, either in favor of the taxpayer or of the other district in which he was taxable. (Ill.) 329.

A tax of 2 per cent on the gross receipts of a foreign building and loan association is held not to interfere with the freedom of commerce

or to deny the equal protection of the laws. (Ky.) 41.

Courts.

The appointment of a receiver by a Federal court is held ineffectual to prevent the subsequent sale of property under execution from a state court to satisfy a mechanic's lien, where the judgment establishing the lien had been rendered before the receiver was appointed. (Mo.) 835.

Power of the courts to interfere with the action of the governor or of a legislative commission of which he is a member, in respect to the selection of a site for a public institution and the letting of contracts therefor, is discussed at length in a case which denies the power of the courts to interfere. (Or.) 473.

Jurisdiction of a cause of action for negligence arising in Mexico was refused in Texas because the Mexican law applicable to the case was so different in respect to the judgment to be entered that the Texas court could not undertake to enforce it. (Tex.) 276.

The right of a state court to entertain an action on an undertaking given to stay proceedings on appeal in admiralty is sustained in an elaborate opinion reviewing the question of jurisdiction as between admiralty and other cases. (N. D.) 238.

The jurisdiction of a court of admiralty in a suit for death of a passenger by collision between vessels is sustained, where the state statute gives such right of action and makes it a lien on the vessel. (C. C. App. 9th C.) 715.

A judgment of a court which has jurisdiction of the matter, committing an infant to the custody of a board of children's guardians, is held not to be void on collateral attack though it assumes to act under an unconstitutional statute. (Ind.) 740.

Municipal corporations.

A constitutional limitation of city indebtedness to the amount for which income and revenue are provided in any year is held not to be violated by a contract to pay an annual sum for a period of years for disposal of sewage, if the annual sum is within such limit. (Cal.) 794.

A contract by city authorities for street lights for a term of five years payable monthly is held void under a statute prohibiting contracts or any other mode of binding the city beyond existing appropriations for the purpose. (Ind.) 743.

An unusual and important case respecting void annexation of territory to a city is that in which, on grounds of estoppel, the court refused to disturb the jurisdiction of the city after it had been exercised for several years. (Iowa) 186.

A statute in Massachusetts requiring a town which votes to establish an electric-light plant to purchase one already established, if there is such, is construed and enforced. (Mass.) 457.

License.

An ordinance imposing a license fee of $10 per day on itinerant merchants is held void for unreasonableness, while a provision discriminating between residents and nonresidents of a city is also held void. (Ill.) 522.

A license tax on peddlers is held unconstitutional where it exempts manufacturers who have paid a tax on capital, since this discriminates against nonresidents. (Va.) 379.

A statute giving municipal authorities discretion to license such persons as they think proper as transient merchants is held to infringe a bill of rights prohibiting exclusive public emoluments or privileges. (Conn.) 55.

Streets.

General authority to open streets and condemn land therefor is held sufficient to justify opening a street across depot grounds of a railroad company. (Iowa) 183.

Road commissioners in Massachusetts were held to be public officers, and not servants of the town, for whose acts the town was liable in the use of a steam drill for the repair of a road, although the work was ordered by county commissioners to be paid for by a special appropriation. (Mass.) 174.

The power of a city to compel proper insulation and support of electric wires laid in the streets is held not to be precluded by the prior grant of a franchise to a gas company to lay pipes or other things in the streets for lighting purposes. (Mo.) 798.

Officers.

The doctrine that there can be no *de facto* officer without a *de jure* office is repudiated by a decision that official acts by officers in an office created by an unconstitutional statute cannot be collaterally attacked before the statute has been authoritatively adjudged unconstitutional. (Ohio) 660.

The civil service provisions of the New York Constitution of 1894 are held to be self-executing so far as to require appointments made without compliance therewith to be held illegal by the courts, while the exemption of the department of public works from the civil service act, which existed under the old Constitution, is held no longer to exist and no re enactment of the law is held necessary. (N. Y.) 399.

The liability of an officer for public funds which he deposits in a bank and which are lost by the bank's failure is held not to be that of an insurer, and to be measured by negligence or want of proper business caution. (Tenn.) 844.

Adopting the stricter and harsher rule which perhaps a majority of the cases follow, the supreme court of Washington holds a county treasurer on his bond although the money had been lost by failure of a bank in which he had deposited the money without any negligence. (Wash.) 851.

Water supply.

A statute regulating the distribution of water from canals is held valid as applied to a prior contract which gave the consumer the right to draw the amount of water to which he was entitled, if the owner of the canal failed to comply with his contract. The statute prohibited this and made ample provision for the distribution of water by persons appointed for that purpose. The contract right was held subject to the police regulation. (Colo.) 828.

A free supply of water to a house of correction chiefly controlled by a board and not by the city council is refused, where the water is furnished by an incorporated board having no source of revenue for the running expenses of

the waterworks except the water rates, although the city is required to pay any deficiency in the expenses of the house of correction, as this expense should be borne by all the taxpayers, and not by the consumers of water only. (Mich.) 463.

Attorney's fees.

The constitutionality of a statute giving attorney's fees in a particular class of cases is sustained as applied to actions against railroad companies for appropriating lands without paying compensation. (Minn.) 553.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

A contract to buy its "requirements" of coal for a season, made by a lumber company, is sustained against the contention that it was uncertain. It is held to mean the amount needed, and not merely what the purchaser should choose to require. (Ill.) 529.

Statute of frauds.

A contract to furnish iron work for a brick building, to be made according to special designs, is held not to be for a sale of personal property within the statute of frauds. (Cal.) 508.

Marriage by a woman is held a sufficient part performance of a contract in consideration of marriage to take it out of the statute of frauds, and an additional part performance is shown where her child was surrendered to the custody of the husband and performed services for him under the contract. (Mo.) 811.

Banks.

The acceptance of a check is held necessary to give a right of action against a bank by the holder for refusal to pay it. (Ohio) 653.

Transferring an account in a savings bank to a new account in the names of the depositor and his wife jointly, subject to the order of either and to survivorship on the death of either, is held to partake somewhat of the character of an equitable assignment, and to give her the property on the husband's death. (Md.) 454.

Bills and notes.

An option for the extension of a note, indorsed upon the back, is held not to destroy its negotiability. (Ala.) 234.

Public policy.

A contract to secure the control of a corporation by the control of the voting of stock of other persons is held void on grounds of public policy. (N. D.) 557.

A sale of lots which were to be distributed by chance among the purchasers, with a prize lot to be given to one of them by chance, is held to be contrary to public policy and to be void. (Ind.) 835.

Sunday contract.

After the execution of a transaction by which forfeits were deposited on Sunday to secure an invalid Sunday contract, the mere fact that this was done on Sunday will not give one party the right to recover back his deposit unless he had notified the holder not to pay it over before this was done. (Ala.) 792.

Guaranty.

A guaranty of interest on a note is held to run only until its maturity. (Ark.) 121.

Insurance.

Death from inhaling illuminating gas while asleep is held to be within a policy although it provided against liability for death from inhaling gas or from anything accidentally taken, administered, or inhaled, or from accidents that bear no external and visible marks. (N. Y.) 686.

The fact that an insane beneficiary in a life insurance policy killed the insured under circumstances that would make the crime of murder if the beneficiary had been in his right mind is held not to defeat his right to the insurance. (Ill.) 67.

Carriers.

The duty of a carrier to furnish passenger cars on a regular passenger train, instead of a baggage car, is sustained unless the baggage car was the best that could be furnished and was made as safe as possible. (Md.) 313.

Oil and gas lease.

A provision that an oil and gas lease shall be void on the lessee's default is held to give him no option to set up the avoidance of the contract as a defense for his breach thereof, but merely to give the lessor a right to declare it void. (Ind.) 673.

Impairing obligation.

The change of remedy on a mortgage contract by extending the time for redemption on foreclosure is held in Montana and Kansas not to constitute an impairment of the contract obligation. (Kan.) 74; (Mont.) 721.

Accord and satisfaction.

A receipt in full given on payment of part of a claim only when there is no dispute about that part, but the other part is disputed, is treated as an accord and satisfaction. (Mich.) 171.

III. CORPORATIONS AND ASSOCIATIONS.

Nonuser of the franchise of a corporation and sole ownership of its stock are held insufficient to constitute a dissolution or vest title of the property in such stockholder. (Tenn.) 706.

A corporation is denied the right to hold corporate meetings in a state other than that in which it is created, for the purpose of organizing, electing officers, or performing any strictly corporate functions in organization; and it is held that it does not constitute a lawful corporation in the state where it thus organizes. (Fla.) 484.

The liability of a corporation for the fraudulent use of uncanceled certificates of stock which had been surrendered and become mere vouchers, by an employee who extracted them from a safe, is denied, although they were in the hands of a bona fide holder. (N. Y.) 779.

Assurances that a certificate of stock is in a

condition for transfer, given on inquiry by a person in charge of the office of a corporation, are held to estop the company from denying its liability where on the faith of such assurances the genuineness of the certificate had been guaranteed. (N. Y.) 776.

The liability of directors for indebtedness of a corporation in excess of its capital stock is considered in a Tennessee case, in which the capital stock paid in is held to be the amount subscribed by stockholders and the indebtedness is held to include bonded indebtedness. (Tenn.) 593.

The power of a president and secretary of an electric-railway company to issue negotiable notes for the corporation is denied, and the exercise of the power by them is held to raise no presumption of their authority. (Ark.) 535.

The invalidity of a contract for the sale of the entire plant of a corporation for shares in another company is declared in a case which holds that affirmative relief may be granted against interference with possession of the property, where the scheme is repudiated before the property is surrendered. (C. C. App. 6th C.) 415.

Preference among creditors.

In harmony with the weight of authority sustaining preferences by insolvent corporations in favor of ordinary creditors, an Illinois case goes to the extent of holding that securities given to directors by a going concern, although insolvent, in order to obtain money loaned at the same time when the securities are given, will be valid. (Ill.) 265.

So, preference to directors of an insolvent corporation is held lawful even when the preferred creditor is a relative of some of the directors, or when the preferred debts were guaranteed by the directors,—at least when it is not shown that they are able to respond to the creditor, or that the preference was for their benefit rather than that of the creditor. (Ill.) 269.

In South Dakota the preference of creditors by an insolvent corporation is denied in a case where the preference was to secure a debt for money borrowed by the company to purchase its own stock. (S. D.) 497.

Partnership.

Insolvent members of an insolvent firm are held to have no right to use the partnership property to pay their individual debts leaving firm debts unpaid. (Miss.) 470.

Name.

The right to the exclusive use of the name of the Grand Lodge of A. O. U. W. is denied to a seceding body which became incorporated, although the older body was unincorporated. (Iowa) 133.

A firm name may be used by a purchaser of the assets and goodwill of a trading partnership upon its dissolution, and where a corporation is organized it may include the firm name in its own. (Ohio) 657.

Religious society.

The rights of the minority of a Free Will Baptist society to prevent a transfer of the property of the society by action of the majority to the Baptist denomination are sustained in an Iowa case, although their manual of church government has a provision for dismissing a church in good standing to join another evangelical denomination, since this is regarded as applying to the church in the ecclesiastical rather than the legal sense. (Iowa) 141.

IV. DOMESTIC RELATIONS.

The liability of children to furnish support to poor parents, declared by a statute which provides no method of enforcing it, is held to make the children liable to the county when it has furnished necessary support. (S. D.) 461.

A statute making sentence to life imprisonment operate as an absolute dissolution of a marriage with the convict is held constitutional under a provision against legislative divorces; and a reversal of such a sentence for error is held not to restore the marriage relation. (Wis.) 515.

Divorce.

Utter desertion for three years as ground for divorce is held to exist where for that time a wife persistently refuses to return to her husband although during the time he makes her a visit and stays with her for several nights. (Me.) 608.

A divorce on a cross-bill in favor of a nonresident is allowed notwithstanding general statutory provisions limiting divorces in favor of residents. (Mich.) 160.

A judgment of divorce is held not to estop the wife who obtained it from asserting that her husband was dead before the divorce, where he was not served in the action and his whereabouts were unknown. (Cal.) 411.

V. PERSONAL RIGHTS.

The right of private persons to object to the publication of their pictures or photographs is held not to extend to a public character such as a great inventor. (C. C. D. Mass.) 283.

An attempt to prevent the erection of a statue as a memorial of a deceased woman, on the ground that it was an invasion of the right to privacy, was not successful where the attempt was made by her relatives and it appeared that the purpose of the statue was to do her honor, although in her lifetime she might have objected to it. (N. Y.) 286.

Post mortem.

The right of the proper officers to make a post-mortem examination without consent of the family of the deceased is sustained in the case of death from seemingly inadequate personal injury. (Md.) 540.

VI. TORTS; NEGLIGENCE; INJURIES.

Seduction.

The right of a betrothed person to recover for the seduction or the alienation of the affections of his affianced is denied in a Michigan case. (Mich.) 282.

Refusal of check.

The right of a trader or merchant to compensatory damages on account of the dishonor of his check when he had funds to meet it is sustained on the ground that it is a slander upon him in his business. (Minn.) 552.

False imprisonment.

False imprisonment procured by a railroad detective is held to render the company liable although he exceeded his authority and disobeyed instructions, where he acted within the scope of his authority. (Tenn.) 702.

Pollution of water.

An injunction against the connection of a sewer underdraining a cemetery with a spring brook from which water is used for domestic purposes is sustained, notwithstanding the water was also polluted to some extent from other sources. (Ill.) 109.

Selling dangerous article.

One who sells a folding bed knowing it to be unsafe, but representing it to be safe, is held liable to any person injured while using it on account of its defects. (Cal.) 221.

Mistake.

A mistake of an attorney in drawing a will is held to give no right of action to a son of the testatrix, who by the mistake is deprived of a benefit that the testatrix intended to give him. (Cal.) 862.

Negligence as to gas.

A gas company which does not exercise care to discover and remedy a leak in a street main when notified that gas is escaping into a cellar of a building abutting on a street is held chargeable with negligence. The same case holds that it is not negligence as matter of law to carry a lighted lamp or to ignite matches in a cellar filled with gas. (Md.) 785.

Negligence as to electric wires.

For the breaking of a telephone wire insecurely fastened above a trolley wire without any guard wires between them, joint liability of the telephone company and the street-railway company is sustained. (Ala.) 589.

The duty to make streets substantially as safe after dangerous electric wires have been placed in them as they were before is held to accompany a grant of the privilege to place such wires in streets; and proof that a broken telephone wire hanging across a feed wire of an electric railway obtained a deadly charge of electricity from the feed wire is held to be sufficiently made by the fact of such contact without anything to show any other source. (Md.) 572.

A detached electric wire hanging in a public alley so as to endanger public travel is prima facie evidence of negligence. (Colo.) 566.

Liability for injury caused by contact with a broken telephone wire which is charged with electricity from a trolley wire is upheld where the street-railway company had not exercised sufficient care to avoid accidents. The extent of such care necessary is held to correspond to the degree of the danger. (Ark.) 570.

An electric-light company may be guilty of actionable negligence in failing to take proper steps to learn the condition of its wires as well as in failing to repair them. (S. C.) 577.

Injury to a workman familiar with electric wires, who while standing on a wooden pole moving electric lamps touched an iron post sustaining a span wire of a trolley line and the span wire at the same time, thus completing the circuit, when the span wire had circuit breaks to prevent charging the post, is held not to create any liability on the part of the trolley company. (Wis.) 583.

Fire.

Storing cotton in a rented building without right when it was hired for the storage of vehicles is held to make the tenant liable for damage to the building by fire, if this would not have resulted except for the dangerous character of the property. (Tenn.) 604.

Railroad negligence.

A railroad is held liable for kicking a car around a curve down grade at a place where numerous people used the track without objection as a footpath, and a boy was struck by the car. (Wash.) 855.

A defect in a sidewalk across a railroad, which causes injury to a person driving a snow plow over it, is held to give him a right of action notwithstanding his unusual use of the walk, if the defect was such as to make the walk unsafe for ordinary purposes. (Mich.) 170.

Carrier's liability.

The liability of a carrier for abuse and insult to one passenger by a drunken and disorderly fellow passenger is sustained where the conductor failed to interfere. (Minn.) 551.

The duty to consider the safety of a drunken passenger on ejecting him from a train is affirmed in a case holding the carrier liable for his death caused by another train soon after. (Ala.) 372.

One assisting to carry a sick passenger from one car to another on request of the conductor is held to have a cause of action against the carrier for injury by negligence in the operation of the train during such removal. (Ohio) 261.

Negligence in boarding an electric street-car in motion is held to be within the rule applicable to other street cars, rather than the rule applicable to steam railroads, and therefore a question for the jury. (Ill.) 331.

A civil engineer of a railroad company traveling in the course of his duty and upon a pass is in the position of an employee, and not of a passenger, with respect to the risk of injury arising from the want of a watchman at a bridge which the train crosses, when he is presumed to know that no watchman is kept there. (C. C. App. 5th C.) 321.

Respondeat superior.

An assault by the agent of an express company upon a person to whom he had just re-

funded an overcharge is held to make the company liable. (Miss.) 390.

The exemption of a charity such as a hospital from the operation of the maxim *respondeat superior* is made in a Connecticut case after elaborate discussion. (Conn.) 224.

Cattle diseased.

The liability of the owner of cattle which communicate disease to others while trespassing on lands insufficiently fenced in Texas is held to depend on his knowledge of their condition, although he knew they were liable to break fences. (Tex.) 669.

VII. PROPERTY RIGHTS.

For one creditor to keep another ignorant of a trade with the debtor for his own protection is held not to avoid the preference which he thereby gains. (Ark.) 609.

Wages due a clerk before and during the last illness of his employer are "wages of servants" within the meaning of a statute classifying claims against an estate. (Kan.) 538.

Adverse possession under a deed purporting to convey the interest of a remainderman, together with the payment of taxes for the period of seven years, is held to bar the estate in remainder notwithstanding the outstanding life estate. This is an exceptional case. The general rule that adverse possession does not run against remaindermen during the life estate is considered in 19 L. R. A. 839. (Ill.) 325.

Manure.

The right of a tenant to manure produced on leased premises by stock in excess of that maintainable by products of the premises is sustained, and it is held that he will not lose his property therein by intermixing it with that of the landlord without the latter's consent. (N. H.) 698.

Gift.

The validity of a gift *causa mortis* of shares in a national bank is sustained in a case in which nearly all the shares of stock in such bank were actually delivered to the donee in contemplation of death. The opinion very extensively reviews the law on this subject of gifts by delivery of this kind of property. (Mont.) 429.

Life estate.

A royalty on an oil or gas lease is held to be an incident of a life estate and therefore included in a reservation of a life use, although the grantor specifically excepted it, also a sale of a part of the royalty previously made. (W. Va.) 128.

On a refusal by a widow to take a life estate given her by will, it is held that a devisee whose share is diminished by the widow's election is entitled to the life interest which the widow refused, as compensation, as against remaindermen claiming to be accelerated, and for any deficit remaining in the devisee's share the other devisees must contribute. (Tenn.) 840.

Trademark.

The words "fireproof oil" are held descriptive and therefore not subject to claim as a trademark for illuminating oil. (Ala.) 374.

A peculiar trademark case, the first of its kind, decides that a trademark cannot be had for such organic property as grape vines so as to prevent the use of the name of the parent stock by any person lawfully cultivating and selling its products. (C. C. App. 3d C.) 44.

Surface waters.

The doctrine as to surface waters in Minnesota is applied to justify the deepening of the natural drainage of a pond or marsh fed by surface waters, although in case of unusual rains the lands below may be more liable to be overflowed. (Minn.) 547.

Islands.

An island formed in a navigable river where land had formerly been washed away is held to belong to the owner of the remainder of the track only when it was formed by accretion beginning at the water line of such remaining land. (Ark.) 317.

Trust.

A fund contributed for the relief of sufferers from a fire by persons whose identity is not known is held to create a trust for the benefit of such sufferers which cannot be diverted by the trustees for the general benefit of the poor of the town, even after suitable relief has been afforded to the sufferers from the fire. (Me.) 118.

Effect of alienage.

The common-law rule against tracing descent through aliens is held revived in Illinois by repeal of a statute which had abrogated that rule, and a claim that provision for descent to next of kin avoided the rule by making the descent immediate to those persons is denied. (Ill.) 85.

Alienage of a son at the death of the testator is held not to bar his descendants from taking as heirs under an executory devise, where the disability of alienage was removed by statute before the time when the heirs were to be determined. (R. I.) 146.

The right of nonresident aliens to inherit from an alien resident is sustained under statutes prohibiting nonresident aliens from acquiring title except that a widow and heirs of aliens who have acquired lands in the state may hold by devise or descent for ten years. (Iowa) 177.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Mandamus to compel the surrender of the insignia of office to one having a certificate of election is held proper, but the title to the office is not adjudicated in such proceeding. (Or.) 342; (Fla.) 357.

A replevin suit for goods sold, discontinued before judgment, with payment of the value of the property replevined to satisfy the replevin bond, is held not to defeat the right to claim payment of the purchase price of the goods. (Md.) 789.

Injuries received outside of the state by an

employee of a railroad company whose line extends into the state are held to be within the Ohio statute making certain defects in railroad apparatus prima facie evidence of negligence. (Ohio) 651.

The rule as to a private action to abate a public nuisance is applied in denying an injunction by the owner of property abutting on a *cul de sac* against obstructing the way between his property and the closed end. (Wis.) 695.

Cases certified.

A certificate of the question whether or not a demurrer should be sustained to plaintiff's petition is held not sufficient to show a question to be decided under a statute requiring the very question to be decided to be certified. (Tex.) 392.

Attachment.

Shipping manufactured products out of the state to fill orders in the course of business is held to be a removal of property when the manufacturer is an insolvent corporation, that will sustain an attachment. (Miss.) 222.

An amendment to a complaint and affidavit for attachment, made after a general assignment for creditors, is held to discharge the attachment as to the assignee, where the amendment substitutes a different cause of action. (Minn.) 422.

Injunction.

An injunction against an elevated railroad in favor of an abutting owner whose easements are interfered with is denied, where his property has increased greatly in value and proportionately with other property in the vicinity by reason of the construction of the railroad. (N. Y.) 407.

An injunction against a default judgment was held not to be justified by the fact that defendant submitted his defense to an attorney and relied upon the latter to present it. (Ky.) 33.

A default judgment upon a note given for a gaming consideration is held not to be subject to attack by injunction. (Ga.) 767.

Fraud is held not to be ground for attacking a judgment by injunction unless it was inequitable and the complainant had exercised due diligence. (Neb.) 747.

The fact that a judgment of a justice of the peace is void for want of jurisdiction is not sufficient to permit an injunction against its execution, where there is a remedy by certiorari to set it aside. (Tex.) 200.

Trespass.

Trespass is held not to be a proper remedy for the unnecessary cutting or trimming of trees on a sidewalk by employees when removing telephone wires. (Ala.) 193.

Principal and Surety.

The right of a surety to his discharge by the discharge of his principal is held to continue even after judgment against him authorizing him to file a bill for relief. (Ind.) 59.

Examination.

The power of a court to make an order for the examination of a horse whose condition was a question in dispute, so as to authorize a veterinary surgeon to go on the premises of the owner without his consent to make it, is denied in a Michigan case. (Mich.) 169.

Receivership.

An attempt to extend the doctrine which gives preferences over mortgages to claims for running expenses of a receivership was made ineffectually in a case of a receivership of a telegraph company to which a bank made a loan which was used in paying claims for which receivers' certicates might have been, but were not, issued. (N. Y.) 403.

IX. CRIMINAL LAW AND PRACTICE.

The constitutionality of the summary proceeding under the South Carolina dispensary act to obtain a restraining order against carrying on the unlawful business is sustained in a case of contempt for violating such order. (S. C.) 678.

The offense of receiving funds on deposit in a bank known to be insolvent, which is declared by the Pennsylvania statute to be embezzlement, is held not to be committed by receiving the funds, knowing the bank to be insolvent, if they are placed in a separate envelope with intent to return them, and this is done without making them at any time a part of the funds of the bank. (Pa.) 124.

Distribution of liquors by an incorporated social club to its members is held not to be a sale within the meaning of a license law. (N. Y.) 510.

Signing another's name as agent is held not to constitute forgery. (Cal.) 831.

A statute making it unlawful to bet upon a horse race in another state, or to send money by telegraph to be wagered in another state on a horse race in a third state, is held to be within the police power. (Va.) 823.

The record of conviction of a principal offender is held admissible against an accessory as prima facie evidence that the principal committed the crime as charged. (Mont.) 294.

A judge presiding on a criminal trial is held incompetent to testify as a witness in the case. (Ark.) 465.

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1. In all cases of purely public concern affecting the welfare of the whole people or the state at large, the action of a court can be invoked only by such executive officers of the state as are by law intrusted with the discharge of such duties. *State, Taylor,* v. *Lord* (Or.) 473

2. An action for personal injuries caused by negligence is transitory, and may be maintained in any place where the defendant is found, if there be no reason why the court should not entertain jurisdiction. *Mexican Nat. R. Co.* v. *Jackson* (Tex.) 276

3. The right of the owner of property destroyed by fire to recover damages from another by whose fault it was burned is, as against the defendant, unaffected by the fact that he may have already received full payment for his loss by insurance, and that the insurer is entitled to be subrogated to the claim. *Anderson* v. *Miller* (Tenn.) 604

4. Bringing a suit in replevin for goods sold, and discontinuing it before judgment, without obtaining any benefit therefrom, because the value of the goods was paid by the plaintiff to satisfy his replevin bond, does not estop him from claiming payment of the purchase price out of the assets of the estate of the purchaser. *Bolton Mines Co.* v. *Stokes* (Md.) 789

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ADOPTION. See CONTRACTS, 4; PARENT AND CHILD, NOTES AND BRIEFS.

ADVERSE POSSESSION.

1. Possession for seven years by one claiming under a deed purporting to convey the interest of a remainderman, and sufficient to constitute color of title, coupled with payment of taxes for the same period, will bar the estate in remainder, notwithstanding the existence of the outstanding life estate, where the remainderman is under no disability and could have paid the taxes. *Nelson* v. *Davidson* (Ill.) 325

2. A deed purporting on its face to convey the title of land to the grantee is sufficient to constitute claim and color of title in the grantee, although the title, when traced back to its source, is not apparently legal and valid. *Id.*

NOTES AND BRIEFS.

Adverse possession; as against remainderman. 325

AFFIDAVIT. See ATTACHMENT, NOTES AND BRIEFS; ESTOPPEL, 2.

ALIENATION OF AFFECTIONS. See SEDUCTION.

ALIENS. See also CONFLICT OF LAWS, 1; DESCENT AND DISTRIBUTION.

NOTES AND BRIEFS.

Right to inherit, see DESCENT AND DISTRIBUTION.

Inheritance by, from, or through, see DESCENT AND DISTRIBUTION.

ANIMALS. See also CONSTITUTIONAL LAW, 17, 24, 25; TRIAL, 6.

1. Knowledge of the owner of cattle that the fence of another person was insufficient cannot make the former liable for trespass by his cattle passing through such imperfect fence. *Clarendon Land I. & A. Co.* v. *McClelland* (Tex.) 669

2. Knowledge that cattle are liable to break fences is necessary in order to make the owner liable in Texas for permitting them to run at large. *Id.*

3. Failure of a land owner to comply with his duty to inclose his lands with a fence sufficient to exclude cattle of all sizes and kinds of ordinary disposition as to breaking fences will prevent his recovering any damages resulting therefrom by trespassing cattle. *Id.*

4. The owner of cattle is liable for their communicating a disease to others, if he knew or had good reason to believe that they could communicate it, and still let them run at large. *Id.*

5. Knowledge of the owner that cattle were breachy, but without knowledge or good reason to believe that they were liable to communicate disease, will not make him responsible for the effect of such disease actually imparted to the cattle of another person in consequence of their breaking a fence. *Id.*

6. Cattle known to be diseased may be placed by the owner in his own pasture without making him liable for communicating the disease, unless he is negligent in the manner of keeping them. *Id.*

NOTES AND BRIEFS.

Animals; liability for communicating disease. 669

APPEAL AND ERROR.

1. The omission of the noncollusion clause from a cross-bill in a divorce suit is not fatal on appeal, but the court may allow it to be supplied. *Clutton* v. *Clutton* (Mich.) 160

2. Practice on appeal in an admiralty case to a territorial supreme court is regulated by rules and usages of courts of admiralty, and not by territorial statutes. *Braithwaite* v. *Jordan* (N. D.) 238

3. Evidence outside of the transcript is inadmissible on appeal to show that a motion stated therein to be made by one of the parties was in fact made by the other. *Norwegian Plow Co.* v. *Bollman* (Neb.) 747

4. The sufficiency of evidence to go to the jury or to sustain a verdict cannot be passed upon on appeal, further than to ascertain if at the close of the plaintiff's case there was evidence tending to prove the facts alleged in his declaration, and whether at the close of all the testimony the evidence, with all the inferences which the jury could justifiably draw from it, was insufficient to support a verdict for plaintiff. *Cicero & P. R. Co.* v. *Meixner* (Ill.) 331

Undertaking.

5. Failure of the court to fix the amount of an undertaking on appeal does not prevent its enforcement, if the respondent has treated the undertaking as sufficient and thereby waived the defect. *Braithwaite* v. *Jordan* (N. D.) 238

6. A good common-law obligation supported by a sufficient consideration is made by an undertaking to secure a stay of proceedings on appeal in an admiralty case, even if a mere cost bond might have been sufficient, where the respondent treats the undertaking as entitling the appellant to a stay. *Id.*

7. A bond reciting judgment for delivery of a vessel to the claimant in an admiralty case, when given to secure a stay of proceedings, is in the nature of a stipulation for value, which is valid as a voluntary bond when claimant refrains from disturbing the appellants in possession of the vessel pending an appeal. *Id.*

Waiver of error or defense.

8. The right of a defendant to be sued in the division of the district of Washington in which he resides is waived by appearing in another division and having the action transferred to that of his residence. *The Willamette* (C. C. App. 9th C.) 715

9. A party cannot complain on appeal of a ruling which he procured to be made. *Norwegian Plow Co.* v. *Bollman* (Neb.) 747

10. An error in instructions cannot be complained of by a party who subsequently asks and obtains the same instructions. *Cicero & P. R. Co.* v. *Meixner* (Ill.) 331
Queen City Mfg. Co. v. *Blalack* (Miss.) 222

11. A defendant in attachment who appears in open court and consents that judgment may be entered for the full sum demanded cannot on appeal, where the declaration, notes, and open accounts sued on, are absent from the record, without exception taken at the trial on the ground that they were not filed, assert that the debt sued for was not due, or that the notes and accounts were not filed. *Queen City Mfg. Co.* v. *Blalack* (Miss.) 222

12. The objection that the ground of an attachment sued out on a large demand consisting of many items, some of which are due and others not, is maintainable only as to a few of them as representing debts fraudulently contracted, must be made in the trial court to be available on appeal. *Id.*

Grounds of reversal.

13. Failure of an instruction to explain the meaning of a word which might mislead the jury is not ground for reversal, if a proper charge upon the subject was not requested. *Clarendon Land I. & A. Co.* v. *McClelland* (Tex.) 669

14. An explanation of a charge, given without objection, is not error where it does not lay down a different proposition of law from that contained in such instruction. *Mitchell* v. *Charleston Light & P. Co.* (S. C.) 577

15. Refusal of an instruction as to how far

intent constitutes fraud is not reversible error if a proper disposition of the case can be arrived at from the acts of the parties without regard to the intent. *Rice* v. *Wood* (Ark.) 609

16. Admission of testimony by the presiding judge on a trial for murder, reflecting on the good faith of defendant in a previous application for a continuance, is reversible error although the testimony is subsequently excluded and no objection was taken to the competency of the judge as a witness, where the competency of the evidence was objected to. *Rogers* v. *State* (Ark.) 465

17. The enforcement of a rule that attorneys who testify in the case cannot, without permission of the court, argue the case to the jury, is not reversible error, where counsel did not, before testifying, explain his position and request the court's permission to sum up. *State* v. *Gleim* (Mont.) 294

Termination of controversy.

18. Reversal of an erroneous injunction decree against making a bust of a deceased person for exhibition at a public fair will not be refused because the fair has closed, if there is also the purpose of placing the bust permanently in a proper place as a memorial to the deceased. *Schuyler* v. *Curtis* (N. Y.) 286

APPORTIONMENT. See ELECTION DISTRICTS.

ASSIGNMENT. See BANKS, 4.

ASSIGNMENT FOR CREDITORS. See INSOLVENCY.

ASSOCIATIONS. See LIMITATION OF ACTIONS, 2.

ASSUMPSIT.

NOTES AND BRIEFS.

To recover money paid for illegal securities. 71

ATTACHMENT. See also CONFLICT OF LAWS, 3.

1. The shipping by an insolvent corporation of its manufactured products out of the state to fill orders by which the goods are to be delivered in other states, so that they remain its property when sent out of the state, is a removal of its property beyond the state which constitutes a ground for attachment, although its business cannot be successfully conducted unless the property is sent outside the state for sale. *Queen City Mfg. Co.* v. *Blalack* (Miss.) 222

2. An attachment is discharged as to an assignee for creditors of the defendant by an amendment to the complaint and affidavit for attachment, made after the assignment, which substitutes an entirely different and distinct cause of action. *Heidel* v. *Benedict* (Minn.) 422

3. Sureties on an indemnity bond to a sheriff to cause him to levy an attachment may be held liable as principals to the owners of the property attached if the attachment is wrongful. *Rice* v. *Wood* (Ark.) 609

NOTES AND BRIEFS.

See also RECEIVERS.

Attachment; right to amend affidavit for:—Statutes permitting amendments; general statute of amendments; matter of substance or form; statute denying amendment; rule in absence of statute; additional affidavits; right to amend as against third person. 422

ATTORNEY GENERAL.

The mere signature of the attorney general in his official capacity, to a complaint or bill shown to be that of a private relator, is not sufficient to impress it with the functions and capacity of an information competent to put in motion the machinery of the courts, whereby they will take cognizance of questions pertaining to the high prerogative powers of the state, or affecting the whole people in their sovereign capacity. *State, Taylor,* v. *Lord* (Or.) 473

ATTORNEYS. See also APPEAL AND ERROR, 17.

An attorney is not liable to a son for even gross negligence in so drawing the will of the mother as not to carry out her desires in the disposition of her property, even though the son suffers great pecuniary loss thereby, there having been no privity of contract between the son and the attorney. *Buckley* v. *Gray* (Cal.) 862

NOTES AND BRIEFS.

Attorneys; negligence of, as a bar to injunction against judgment. 36

ATTORNEYS' FEES. See CONSTITUTIONAL LAW, 9, NOTES AND BRIEFS.

AUTOPSY. See CORONER, NOTES AND BRIEFS; CORPSE.

BANKS. See also CORPORATIONS, 13; OFFICERS, 2, 3, 5; WILLS, 2.

1. The refusal to honor a check when there are funds in a bank against which it is drawn gives the drawer a right of action against the bank, if he is a trader or merchant. *Svendsen* v. *State Bank* (Minn.) 552

2. The holder of an unaccepted check cannot maintain an action against the bank for refusal to pay it, although there stands to the credit of the drawer on the bank books a sum more than sufficient to meet it. *Cincinnati, H. & D. R. Co.* v. *Metropolitan Nat. Bank* (Ohio) 653

3. A banker who receives money, knowing that he is insolvent, but puts it into a special envelope with intent to return it to the depositor, which is afterwards done, without making the money at any time part of the funds of the bank, is not guilty of receiving money from a depositor with knowledge that the bank is insolvent, which under Pa. Laws 1889, § 1, is declared to be embezzlement. *Com.* v. *Junkin* (Pa.) 124

4. A transfer of a savings bank account to a new account in the names of the former depositor and his wife, making it subject to the

order of either and to survivorship on the death of either, partakes somewhat of the nature of an equitable assignment, and entitles the wife to the fund after the husband's death. *Metropolitan Sav. Bank* v. *Murphy* (Md.) 454

NOTES AND BRIEFS.

See also BONDS.

Banks; liability for refusing check. 552

Right of holder of check against. 654

Criminal liability for receiving deposit in bank knowing of its insolvency:—In general; constitutionality of statutes; effect of adopting existing nomenclature in defining the offense; liability in the absence of statute; who liable; liability of partnership; sufficiency of proof; other rulings. 124

Joint account in savings banks. 454

BARBERS. See CONSTITUTIONAL LAW, 6, 22.

BETTING. See also CONFLICT OF LAWS, 4.

NOTES AND BRIEFS.

On horse race in other state. 823

BILLS AND NOTES. See also CONTRACTS, 9; CORPORATIONS, 8, 9; GUARANTY.

An option indorsed upon the back of a negotiable note for its extension for a definite time, by giving a new note at the option of the makers and indorsers similar to the original, does not destroy its negotiability. *Anniston Loan & T. Co.* v. *Stickney* (Ala.) 234

NOTES AND BRIEFS.

Bills and notes; provision for renewal as affecting negotiability. 234

BONDS. See also APPEAL AND ERROR, 5–7; ATTACHMENT, 3.

1. Bonds given by the board of education of a school district to obtain money which was not borrowed or used for any purpose for which the board was authorized by its charter to issue bonds are void. *Normal School Dist. Bd. of Edu.* v. *Blodgett* (Ill.) 70

2. An officer is not an insurer of the safety of public funds in his hands, on a bond faithfully to perform his duties and to collect and pay over moneys, but is responsible only for the exercise of good faith, diligence, prudence, caution, and a disinterested effort to keep and preserve the fund for those entitled. *State, Overton County,* v. *Copeland* (Tenn.) 844

3. The loss of public money by a bank failure will not prevent liability of the county treasurer upon his bond to pay the money as the commissioners shall direct, although he was not negligent in selecting the bank and the county has not provided a suitable and safe place in which to deposit the money. *Fairchild* v. *Hedges* (Wash.) 851

NOTES AND BRIEFS.

Bonds; of officers, liability for loss of public money by bank failure. 851

BUILDING AND LOAN ASSOCIATIONS. See COMMERCE, 1; CONSTITUTIONAL LAW, 7; CONTRACTS, 14; TAXES, 1.

BURDEN OF PROOF. See EVIDENCE, NOTES AND BRIEFS.

BUST. See APPEAL AND ERROR, 18; INJUNCTION, 11, 12; PRIVACY, 3.

CANAL. See CONSTITUTIONAL LAW, 23.

CAPITAL. See also CONSTITUTIONAL LAW, 3–5; CONTRACTS, 1.

1. There can be no irrepealable law to prevent the removal of the seat of state government, as this involves a governmental subject. *Edwards* v. *Lesueur* (Mo.) 815

2. The power to select and afterwards to change its own seat of government if deemed expedient is necessarily implied in a state Constitution providing for a republican form of government not repugnant to the Constitution of the United States, and making no limitation upon its political or governmental power or the power to manage its own internal affairs. *Id.*

NOTES AND BRIEFS.

Capital, of state, constitutional amendment changing; implied contract as to. 817

CARRIERS. See also CONSTITUTIONAL LAW, 16; COURTS, 7; EVIDENCE, 8.

1. One who purchases a ticket for a regular passenger train has a right to be conveyed in a passenger coach instead of a baggage car, unless the latter is as safe a vehicle as can be procured by the utmost care and diligence. *Baltimore & P. R. Co.* v. *Swann* (Md.) 313

2. A woman who takes passage in a baggage car, when no passenger cars are provided for a passenger train, and pressing domestic duties call for her immediate transportation, does not thereby renounce her right as a passenger to safety and protection. *Id.*

3. Reasonable effort at least to make a baggage car safe and convenient for a passenger is necessary when this is the only vehicle that can be furnished for passengers in a regular passenger train. *Id.*

4. A passenger who becomes sick on a railroad train is entitled to such care from the carrier as is fairly practicable for it to give with the facilities at hand, without thereby unduly delaying the train or unreasonably interfering with the safety and comfort of other passengers. *Lake Shore & M. S. R. Co.* v. *Salzman* (Ohio) 261

5. A passenger who aids in carrying another who has become sick on the train, into another car on the conductor's request in order that he may be treated by a physician, can recover against the carrier for injuries sustained by falling between the car platforms, which was caused by the negligence of the carrier's servants. *Id.*

6. A civil engineer of a railroad company traveling on duty for the company, upon a pass exempting the company from liability for

injuries to person or property, occupies the position of an employee, and not that of a passenger upon the train upon which he is carried. *Texas & P. R. Co.* v. *Smith* (C. C. App. 5th C.). 321

7. Insult to and abuse of a passenger by a drunken and disorderly fellow passenger, which the conductor permits to continue in his presence without interference, renders the carrier liable to damages. *Lucy* v. *Chicago G. W. R. Co.* (Minn.) 551

8. The intoxication and misbehavior of a passenger which will authorize his expulsion from a train will not justify his expulsion without exercising due care for his safety, having reference to time, place, and surroundings. *Louisville & N. R. Co.* v. *Johnson* (Ala.) 372

9. The ejection from a train at night, of a passenger known to be drunk and irresponsible, at a place from which he can escape only by following the roughly ballasted railroad track and crossing cattle guards on one side and a bridge over a creek on the other, renders the railroad company liable where he is killed by another train soon after. *Id.*

10. The cursing, abuse, and maltreatment of a person by an agent of an express company, immediately after refunding to such person overcharges which he had come to the office to obtain, and the delivery of a receipt therefor, are part of the *res gestæ* and makes the company liable for the tort. *Richberger* v. *American Express Co.* (Miss.) 390

11. To board or depart from an electric car while in motion is not negligence *per se*. *Cicero & P. R. Co.* v. *Meixner* (Ill.) 331

NOTES AND BRIEFS.

Carriers; duty as to passenger taken ill during journey. 261

Duty as to furnishing proper cars for passengers:—In general; adoption of improvements; character of train. 313

Railroad employees or officers as passengers:—Riding in course of or as part of employment; transportation to or from work; person riding for purposes of his own. 321

Compelling to furnish facilities for business of other roads. 48

Liability for abuse of customer by servant. 390

Duty to protect passenger. 551

CASE.

One who sells a folding bed, representing it to be safe for use when he knows it to be dangerous, is liable for injuries caused by defects in the bed to any person who uses it, although there may be no privity of contract between them. *Lewis* v. *Terry* (Cal.) 220

CASES CERTIFIED.

The "very question to be decided," which is required to be certified by the court of civil appeals, under the Texas statutes, is not presented by a certificate of the question whether or not a demurrer should be sustained to plaintiff's petition. *Waco Water & L. Co.* v. *Waco* (Tex.) 392

NOTES AND BRIEFS.

Cases certified: definiteness of question to be certified:—Whole case must not be sent up; whole case cannot be split up into distinct points; importance of questions; point of difference; question not general; question not abstract; question to be perfectly stated; question of fact not to be involved; necessary facts to be stated; as to sufficiency of evidence or indictment; as to demurrer; what will be considered; questions held proper; Illinois decisions; Iowa decisions; New Jersey decisions; Ohio decisions; Texas decisions; Wyoming decisions; criminal cases; tax cases. 392

CATTLE. See ANIMALS.

CENSUS. See EVIDENCE, 2.

CHARITIES.

1. A charitable corporation maintaining a hospital is not liable for injuries caused by personal wrongful neglect of servants who have been selected with due care. *Hearns* v. *Waterbury Hospital* (Conn.) 224

2. A fund contributed for the relief of sufferers from a fire, by persons whose identity is lost so that a surplus cannot be returned to them, must be expended for the benefit of such sufferers, and cannot be capitalized for the support of the town poor generally. *Doyle* v. *Whalen* (Me.) 118

3. Sufferers from a fire for whose benefit a fund has been donated by individuals unknown may maintain a bill to compel the trustees to expend the fund for their benefit, if the trustees have undertaken to capitalize the fund for the general benefit of the poor of the town. *Id.*

NOTES AND BRIEFS.

Charities; liability for negligence of servants. 224

CHECKS. See also BANKS, 2; DAMAGES, 1.

NOTES AND BRIEFS.

Right of holder against bank. 654

CIVIL ENGINEER. See MASTER AND SERVANT, 3.

CIVIL SERVICE. See also CONSTITUTIONAL LAW, 1; STATUTES, 3.

The constitutional provisions respecting the powers and duties of the superintendent of public works, which the New York Constitution of 1894 adopted from the former Constitution, must be read and understood in connection with the new section of the Constitution requiring civil service appointments to be made according to merit, ascertained so far as practicable by competitive examinations. *People, McClelland,* v. *Roberts* (N. Y.) 399

NOTES AND BRIEFS.

Civil service; constitutional provisions as to; department of public works. 399

CLERK. See also EXECUTORS AND ADMINISTRATORS.

The power given by statute to a clerk of court to issue injunction orders cannot be exercised by his deputy under a statute providing that any duty enjoined upon a ministerial officer and any act permitted to be done by him may be performed by his lawful deputy. *Payton* v. *McQuown* (Ky.) 33

CLUB. See INTOXICATING LIQUORS, NOTES AND BRIEFS.

COLLISION. See ADMIRALTY.

COLUMBIAN EXPOSITION. See COUNTIES.

COMITY. See COURTS, 3.

COMMERCE.

1. Freedom of commerce between the states is not interfered with by Ky. Stat. § 4228, requiring every building and loan association to pay into the treasury annually 2 per cent of its annual gross receipts. *Southern Bldg. & L. Asso.* v. *Norman* (Ky.) 41

2. A statute making it unlawful to make or record a bet upon any race of animals in another state is a proper exercise of the police power of the state, and not an unlawful interference with interstate commerce. *Ex parte Lacy* (Va.) 822

3. An exemption of manufacturers who have paid taxes on capital employed, from the provisions of a statute imposing a license tax upon peddlers, renders the statute unconstitutional as a regulation of commerce when applied to a nonresident acting as an agent or employed in the sale of goods owned and manufactured by a nonresident corporation. *Com.* v. *Myers* (Va.) 379

4. An ordinance prohibiting the business of itinerant merchants to be carried on without a license is not invalid as a regulation of interstate commerce, as applied to one who purchases bankrupt stocks wherever he can obtain them to the best advantage and sometimes buys them in other states, when it makes no discrimination between merchants whose goods are imported into the state and those whose goods are manufactured or purchased in the state, and does not impose any burden on sales in original packages brought into the state. *Carrollton* v. *Bazzette* (Ill.) 522

NOTES AND BRIEFS.

Commerce; interstate, as affected by license tax. 379

Interstate; statute as to bets on horse race in other state. 823

COMMON LAW. See also DESCENT AND DISTRIBUTION, 1.

1. The repeal of a statute which abrogated a common-law rule revives that rule. *Beacan* v. *Went* (Ill.) 85

2. A statutory adoption of the common law of England, so far as applicable and of a general nature and not in conflict with special enactments, does not preclude the consideration of the expositions of the common law by judicial authorities of our own country in determining what the common law is. *Leyson* v. *Davis* (Mont.) 429

CONFLICT OF LAWS.

1. The status as a legitimate heir of an alien born before the marriage of his parents is to be determined by the law of their domicil. *DeWolf* v. *Middleton* (R. I.) 146

2. The law of Mexico must be applied to the rights of the parties in an action against a railroad company by an employee for a personal injury sustained in that country, in which the contract of service was made. *Mexican Nat. R. Co.* v. *Jackson* (Tex.) 276

3. Attaching the lines and property of a telegraph company in other states, after a receiver has been appointed in the state of which the attachment creditor is a citizen and the creditor served with a copy of an injunction against interfering with the receivership, is a violation of the injunction, and can give the creditor no lien which can be asserted in an equitable administration of the assets in the state where the receiver was appointed. *Farmers' Loan & T. Co.* v. *Bankers' & N. Teleg. Co.* (N. Y.) 403

4. Forwarding money by telegraph to another state to be wagered on a horse race to take place in a third state may be made a criminal offense in the state from which the money is sent, although it is lawful to make such wagers in the state in which the wager is made. *Ex parte Lacy* (Va.) 822

CONSTABLE. See LEVY AND SEIZURE, 2.

CONSTITUTIONAL LAW. See also CAPITAL; EVIDENCE, 7, 9; SEARCH AND SEIZURE; STATUTES, 3.

1. The self-executing mandate of N. Y. Const. 1894, art. 5, § 9, declaring that civil service appointments "shall be made according to merit and fitness, to be ascertained so far as practicable by examinations, which, so far as practicable, shall be competitive," requires the courts in a proper case to pronounce appointments made without compliance with its requirements illegal. *People, McClelland,* v. *Roberts* (N. Y.) 399

2. A statute providing that the insurance commissioner shall prepare, approve, and adopt a printed form of a policy of fire insurance, to conform as near as can be made applicable to that used in a certain other state, is an unconstitutional attempt to delegate to him legislative power. *Dowling* v. *Lancashire Ins. Co.* (Wis.) 112

Constitutional amendments.

3. The establishment of the seat of government of a state is a proper subject of constitutional control, and therefore of constitutional amendment. *Edwards* v. *Lesueur* (Mo.) 815

4. Conditions imposed and powers delegated by a proposed constitutional amendment to change the location of the seat of state government, whereby, in addition to the vote of the people which the existing Constitution requires

for an amendment, donations of property and the erection of state buildings, to be approved and accepted by a commission, are made a condition of the change of location, will not make the proposed amendment inoperative, since upon the vote of the people adopting the amendment the conditions will be imposed and the powers delegated by the Constitution itself. *Id.*

5. A vote in favor of a proposed constitutional amendment, taken by yeas and nays and entered in full on the legislative journals in full compliance with the constitutional provisions on this subject, is sufficient without having the resolution read on different days or in other respects taking the course required for ordinary legislation. *Id.*

Equal protection of laws.

6. A statute permitting barbers in two localities of the state only, to pursue their business during certain hours on Sunday, does not deny to barbers in other places the equal protection of the laws, since it affects all within the same localities alike. *People* v. *Havnor* (N. Y.) 689

7. The equal protection of the laws is not denied to foreign building and loan associations doing business within the state, by Ky. Stat. § 4228, requiring such associations to pay into the treasury annually 2 per cent of their annual gross receipts. *Southern Bldg. & L. Asso.* v. *Norman* (Ky.) 41

Equal rights; discrimination.

8. A statute authorizing the mayor and certain other officers to issue a license "to such persons as they find proper persons to engage in a temporary or transient business," for a fee not less than $1 nor more than $100 as the authority issuing such license may direct, and making such business a misdemeanor except in the sale of products of a farm or the sea,—is, so far as it applies to ordinary and lawful business, a violation of the Connecticut Bill of Rights, declaring that all men "are equal in rights, and that no man or set of men is entitled to exclusive public emoluments or privileges from the community." *State* v. *Conlon* (Conn.) 55

9. A statute allowing reasonable attorneys' fees in an action to recover possession of land taken by a railroad company, without compensation, for its right of way, is not unconstitutional on the ground of class discrimination. *Cameron* v. *Chicago, M. & St. P. R. Co.* (Minn.) 553

Due process of law.

10. Deprivation of a remedy is equivalent to the deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. *Normal School Dist. Bd. of Edu.* v. *Blodgett* (Ill.) 70

11. A right of defense is a remedy of the defendant within the consitutional protection of rights. *Id.*

12. A complete defense under the statute of limitations is property within the protection of a constitutional guaranty of due process of law. *Id.*

13. A school district or municipal corporation has the same constitutional protection that an individual would have against the abrogation by statute of its already complete defense under the statute of limitations. *Id.*

14. Failure to provide for a notice to the person whose property may be affected by a local assessment, and to give opportunity to appear and contest the legality, justice, and correctness of the assessment, at some stage in the proceedings before it becomes final, renders the statute authorizing such assessments void for want of due process of law. *Violett* v. *Alexandria* (Va.) 382

15. A statute making the issue of improvement bonds conclusive of the validity of an assessment, and permitting the issue of the bonds without actual notice to the owners of the property assessed or on published notice only, within forty days after the assessment is finally determined, is unconstitutional as providing for deprivation of property without due process of law. *Hayes* v. *Douglas County* (Wis.) 213

16. A statute absolutely requiring a railroad company to carry freight for the same rates that any other company may accept for hauling the same freight between the same points, although by a shorter line, without giving the right of judicial investigation by due process of law, and no matter how great disparity in the length of such hauls may be,—is unconstitutional as a deprivation of property without due process of law. *State, Board of Transp.* v. *Sioux City, O. & W. R. Co.* (Neb.) 47

17. The owner of hogs is not deprived of his property without due process of law by making it unlawful to permit them to run at large. *Haigh* v. *Bell* (W. Va.) 131

18. Due process of law is not furnished by a judgment pronounced after opportunity to be heard by a court of competent jurisdiction, in accordance with the provisions of a statute, unless that statute accords with the provisions of the fundamental law. *People* v. *Havnor* (N. Y.) 689

Police power.

19. Every man's liberty and property are to some extent subject to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all. *Id.*

20. The physical welfare of the citizen is a subject of such primary importance to the state, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power. *Id.*

21. The limitation on the legislative exercise of the police power is that such a statute must have a reasonable connection with the welfare of the public. *Id.*

22. A statute prohibiting barbers from carrying on their trade on Sunday is a constitutional exercise of the police power to promote the public health. *Id.*

23. A canal used for the carriage of water for hire is affected by a public interest and subject to legislative regulation in respect to the distribution of the water. *White* v. *Farmers' Highline C. & R. Co.* (Colo.) 828

24. An act making it unlawful for the owner of hogs to permit them to run at large is an

exercise of the police power. *Haigh* v. *Bell* (W. Va.) 131

25. A county court in West Virginia, which has superintendence and administration of the internal and fiscal affairs of the county, though shorn of general judicial power, may be given by the legislature authority, upon petition of a certain number of voters, to adopt a certain statute respecting the running at large of hogs. *Id.*

NOTES AND BRIEFS.

Constitutional law; police power as to license of occupation. 55

Delegation of power to insurance commissioners. 113

Due process in assessment. 332

As to attorneys' fees in a particular class of cases. 553

Police power as to Sunday law; class legislation. 689

Amendment changing seat of government. 817

CONTEMPT.

Appearing and answering as to the merits on a charge of contempt will prevent any attack for lack of jurisdiction of the person, on a decision that the party is in contempt. *Ex parte Keeler* (S. C.) 678

CONTINUANCE. See APPEAL AND ERROR, 16.

CONTRACTS.

See also CONFLICT OF LAWS, 2; CORPORATIONS, 11, 12; LOTTERY; MUNICIPAL CORPORATIONS, 2-6.

1. An implied contract against the removal of the seat of state government from its original location is not made with property owners at that place by its location there. *Edwards* v. *Lesueur* (Mo.) 815

2. A contract for its "requirements" of coal for a certain season, made by a lumber company, is not void for uncertainty and for want of mutuality, when it was evidently meant to call for the amount of coal which the corporation should need in its business for such season, and not merely what it might choose to require of the other party. *Minnesota Lumber Co.* v. *Whitebreast Coal Co.* (Ill.) 529

3. An oral contract to manufacture and furnish ironwork for a brick building according to special designs and measurements, suitable only for use in that particular building, is not within the statute of frauds as a sale of personal property. *Heintz* v. *Burkhard* (Or.) 508

4. An oral contract for the adoption of a child as an heir may be recognized and enforced after performance of the consideration. *Nowack* v. *Berger* (Mo.) 810

5. Marriage constitutes such part performance by a woman of a contract in consideration of marriage as to prevent the operation of the statute of frauds in respect to the contract. *Id.*

6. The surrender of a child by his mother to the custody and control of a man whom she marries, in pursuance of an oral contract by which, in consideration of the marriage and of the services of the child, the husband agrees to give the child a share of his estate equal to that which an heir would inherit, constitutes an independent, additional, and valuable consideration which will amount to part performance of the contract, and take the case out of the operation of Mo. Rev. Stat. 1889, § 5186, prohibiting an action on a contract in consideration of marriage unless it is in writing. *Id.*

Illegality.

7. A contract to allow another to control the voting of stock, based upon a promise of the latter to secure an office in the corporation for the owner of the stock, is illegal; and such illegal promise, although only a part of the consideration of the contract, renders the whole contract void. *Gage* v. *Fisher* (N. D.) 557

8. A contract for the privilege of ordering any quantity of coal not exceeding 12,000 tons is not an option contract in violation of Ill. Crim. Code, § 130, where it is made as a modification of a prior disputed contract, with the intention of limiting the quantity to be ordered, without relieving the purchaser from an obligation under the prior agreement to purchase the amount required in a certain business. *Minnesota Lumber Co.* v. *Whitebreast Coal Co.* (Ill.) 529

9. A note given in consideration of concealing from the maker's wife and from the public his criminal intimacy with another woman cannot be enforced. *Case* v. *Smith* (Mich.) 282

10. Affirmative relief in equity against an illegal contract by a corporation to transfer its entire plant and business to another company, and a conveyance in pursuance thereof, may be given to the extent of an injunction against interference with the title or possession of the original corporation, where before actually surrendering the possession of its property, or receiving all the consideration, it repudiated the whole scheme and tendered back all that it had ever received, and has kept the tender. *McCutcheon* v. *Merz Capsule Co.* (C. C. App. 6th C.) 415

Effect; rescission; action.

11. The share which a person is entitled to from an estate of a person who had agreed to give the former a specified share thereof cannot be diminished because of a gift by will of a portion of the estate to the children of the distributee. *Nowack* v. *Berger* (Mo.) 810

12. A purchase of stock at an exorbitant price, to secure control of the corporation, will not be rescinded on the ground that the seller had threatened to break his contract to give the purchaser control of the stock for voting purposes, and sell it to the opposing faction. *Gage* v. *Fisher* (N. D.) 557

13. The employment of an attorney by a mother to draw her will, in which a provision was made for one of her sons, is not a contract made for the benefit of the latter, within Cal. Civ. Code, § 1559, providing that a third person may enforce a contract entered into between others for his benefit, so as to entitle such son to recover from the attorney for his gross mistake in so writing the will as to de-

prive the son of the provision designed by the testatrix for his benefit. *Buckley* v. *Gray* (Cal.) 862

Impairing obligation.

14. The obligation of previous contracts of subscription to a foreign building and loan association doing business within the state is not impaired by Ky. Stat. § 4228, imposing an annual tax of 2 per cent on the annual gross receipts of all such associations. *Southern Bldg. & L. Asso.* v. *Norman* (Ky.) 41

15. A contract giving a consumer of water the right to draw and take from a canal all he may be entitled to on tender or payment of the amount due therefor, if the owner of the canal fail or refuse to comply with the contract, is not protected against legislative interference by a subsequent statute prohibiting such acts and regulating the distribution of water from such canals, but giving a remedy for the enforcement of the right to receive all the water to which the contract entitles him. *White* v. *Farmers' Highline C. & R. Co.* (Colo.) 828

16. General remedies afforded by state jurisprudence and practice, entirely aside from anything contained in a contract, never constitute any part of its obligation, and may be changed from time to time. *Beverly* v. *Barnitz* (Kan.) 74, Rev'd in *Barnitz* v. *Beverly*, 163 U.S. 118, 41 L. ed. —.

17. A remedy agreed upon in a contract itself, with the sanction of the state law, is indistinguishable from the obligation, and constitutes a part of it. *Id.*

18. A change in the remedy on foreclosure of a mortgage by Kan. act 1893, making it unnecessary to having an appraisement fixing the amount to be obtained on the sale, and hastening the time for sale in certain cases, but, on the other hand, extending for a year, at most, the time when the purchaser can get a deed, during which the mortgagor is entitled to possession, but for which he must pay interest on the sale price in case of redemption,—does not impair the obligation of a contract, as it merely changes the general remedy, and the mortgage in that state is a mere security, vesting no title and giving no right of possession either before or after breach. *Id.*

19. A statute extending the time for redemption upon the sale of mortgaged premises does not impair the obligation of the contract made by a pre-existing mortgage. *State, Thomas Cruse Sav. Bank* v. *Gilliam* (Mont.) 721

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See also CORPORATIONS.

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CONVICTS. See HUSBAND AND WIFE, 3, NOTES AND BRIEFS.

CORONER. See also CORPSE, 1.

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Power of, to order post mortem examination. 540

CORPORATIONS. See also CONTRACTS, 7, 12; EVIDENCE, 14; GIFT, 2–4; LIMITATION OF ACTIONS, 3; RECEIVERS, 2; SPECIFIC PERFORMANCE; WRIT AND PROCESS.

1. A corporation receiving its charter from one state cannot hold corporate meetings in another for the purpose of organizing, electing officers, or performing any strictly corporate functions in its organization. *Duke* v. *Taylor* (Fla.) 484

2. An attempted organization of a corporation in one state, under a charter granted in another state, does not constitute it a *de facto* corporation so as to relieve the members from liability as partners, as to give an association such a status the attempted organization must be under semblance of authority, which does not exist in the case supposed. *Id.*

3. Corporations are not bound by false and simulated entries upon their records unless they have estopped themselves to deny their truth. *City Electric Street R. Co.* v. *First Nat. Exch. Bank* (Ark.) 535

4. A sole stockholder of a corporation has no title, legal or equitable, to its property, which he can convey by a deed in his own name. *Parker* v. *Bethel Hotel Co.* (Tenn.) 706

Name.

5. The right of a corporation to the exclusive use of a name as against another organization using the same name does not follow from the fact that the latter is doing an unlawful business. *Grand Lodge A. O. U. W.* v. *Graham* (Iowa) 133

6. The certificate of the auditor as to the right of a corporation to a name is not binding upon another body claiming the right to the name. *Id.*

7. The right to use the name "Grand Lodge of the Ancient Order of United Workmen of Iowa" cannot be claimed by a seceding body merely because it has become incorporated, to the exclusion of the body from which it seceded, which previously had used the name and continued to do so without incorporation. *Id.*

Contracts.

8. The president and secretary of a corporation have no inherent power to execute negotiable notes in its name. *City Electric Street R. Co.* v. *First Nat. Exch. Bank* (Ark.) 535

9. The exercise of the power to make negotiable notes by officers of a corporation does not raise a presumption of their authority to

do so, in the absence of a usage or custom from which such authority can be implied. *Id.*

10. A corporation as such has no power to create a debt by borrowing money with which to purchase its own stock,—especially when it is in failing circumstances. *Adams & W. Co.* v. *Deyette* (S. D.) 497

11. A sale of the entire manufacturing plant, including patents, processes, and goodwill, of a corporation, with an agreement that it would never again engage in the same business, made in consideration of stock in a new corporation, without intending to wind up the affairs of the former, but with the object of continuing its corporate life and activity, to be exercised through the other corporation, is *ultra vires* and void. *McCutcheon* v. *Merz Capsule Co.* (C. C. App. 6th C.) 415

12. The consent of stockholders cannot legalize or vitalize a void illegal contract by which a corporation attempts to transfer all its property to another company in consideration of shares in the latter. *Id.*

Stock.

13. A transfer on the books of a national bank is not necessary to give to a donee or purchaser an equitable title to the shares. *Leyson* v. *Davis* (Mont.) 429

14. An entry on the books of a corporation is not necessary to vest a vendee of shares of stock with all the title which the vendor had, notwithstanding a provision in the charter or by-laws that no transfer shall be complete or effectual without registration. *Parker* v. *Bethel Hotel Co.* (Tenn.) 706

15. Information that a certificate of stock is in a condition for transfer, given by a person in charge of the office of a corporation in response to an inquiry, on the faith of which a broker guaranteed its genuineness, estops the corporation from denying its liability to indemnify him or his assignee against loss on account of the fact that the certificate was spurious and worthless. *Jarvis* v. *Manhattan Beach Co.* (N. Y.) 776

16. The title of the true owner of a lost or stolen certificate of stock in a corporation may be asserted against any one subsequently obtaining its possession, even if the holder is a bona fide purchaser. *Knox* v. *Eden Musee Americain Co.* (N. Y.) 779

17. Directing an employee to cancel surrendered certificates of stock does not give him any authority, expressed or implied, to act as agent in issuing them, so as to bind the corporation by his wrongful use of them to secure a personal loan. *Id.*

18. Permitting surrendered certificates of stock to remain uncanceled in the safe of the corporation to which an employee has access, and relying upon him to cancel the certificates as he was directed to do, is not such negligence as will make the corporation liable for his fraudulent use of them to secure a personal loan about three weeks later, if the company did not know or have reason to suspect that he was dishonest, although a by-law requiring the cancelation of the surrendered certificates was not complied with. *Id.*

Liability of directors.

19. Dividends paid by the directors of a corporation when it is realizing a net profit on its business, and when the assets as honestly estimated by them exceed its liabilities, will not render them individually liable under a charter imposing such liability for dividends paid when the company is insolvent, although the assets prove to have been largely overestimated and the company in fact insolvent. *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co.* (Tenn.) 593

20. Consent to the creation of indebtedness of a corporation in excess of its assets, which will make directors individually liable therefor under a statute imposing such liability, must be given in their capacity as directors. *Id.*

21. The term "indebtedness," in the charter of a corporation making directors liable personally for indebtedness in excess of capital stock paid in, includes bonded indebtedness. *Id.*

22. The term "capital stock paid in," in the charter of a corporation making directors liable for debts in excess of such stock, means the amount subscribed by the stockholders, and not the total value of the assets. *Id.*

23. Although the directors' liability for indebtedness of a corporation in excess of the capital stock is available only in favor of creditors whose debts were illegally contracted, yet it cannot be enforced by each creditor individually, but must be enforced by a bill filed for the benefit of all creditors similarly situated. *Id.*

Dissolution; winding up.

24. Nonuser of the franchise of a corporation, and the sole proprietorship of all its capital stock, will not constitute a dissolution of the corporation without a judicial adjudication thereof. *Parker* v. *Bethel Hotel Co.* (Tenn.) 706

25. The existence of a corporation or its title to property cannot be attacked collaterally on the ground of its dissolution or forfeiture of franchise, until dissolution has been judicially pronounced. *Id.*

26. A creditor of a corporation may, without obtaining judgment against it, maintain a bill under the Tennessee statutes to wind up its affairs, if, after sustaining large losses, it has suspended business with no preparation for resumption, and has executed trust deeds in favor of certain creditors covering practically all its assets, while its claim to solvency is based upon extravagant valuations of its assets. *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co.* (Tenn.) 593

27. A sale of property in a suit to wind up an insolvent corporation is not made subject to the provisions as to redemption, in a statute governing sales in foreclosure proceedings or under decrees for the payment of money, by the fact that in the suit are filed cross bills seeking preferences in the assets, if the decree refuses to recognize such claims, but leaves the assets unencumbered thereby. *Blair* v. *Illinois Steel Co.* (Ill.) 269

Preference of creditors.

28. Trust deeds in favor of certain creditors, executed by a corporation after sustaining heavy losses and suspending business and when it cannot meet its accruing liabilities, will be

set aside. *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co.* (Tenn.) 593

29. An insolvent corporation has no authority to prefer creditors. *Adams & W. Co.* v. *Deyette* (S. D.) 497

But see cases following.

30. Directors and officers of an insolvent corporation can dispose of its property in good faith to pay or secure corporate debts, even though the result is to give some creditors a preference over others. *Illinois Steel Co.* v. *O'Donnell* (Ill.) 265

31. Relationship of a creditor of an insolvent corporation to one or more of its directors or officers will not prevent the giving of a valid security as a preference to such creditor. *Id.*

32. A preference given by an insolvent corporation to a creditor, having no indorsement or guaranty from its directors, is not unlawful though she is an aunt of three of the directors. *Blair* v. *Illinois Steel Co.* (Ill.) 269

33. Valid securities may be given to its directors by a corporation, although it is in fact insolvent, where it is a going concern doing a large business, and the securities are given for money loaned at the same time in good faith to enable the company to carry on the purposes of its incorporation. *Illinois Steel Co.* v. *O'Donnell* (Ill.) 265

34. Subsequent insolvency of a corporation which has borrowed money when solvent from officers or directors will not affect their rights of action to recover such loans and enforce their securities. *Id.*

35. Judgment notes of a corporation, renewed after its insolvency, are in the same position with respect to the right of the corporation to make preferences as prior judgment notes for which the renewals were given. *Id.*

36. A preference by an insolvent corporation, of creditors whose debts have been guaranteed by directors of the corporation, is not invalid although made without the requirement or knowledge of the creditors, unless it otherwise appears that it was made for the benefit of the directors or guarantors, and not for that of the creditors themselves. *Blair* v. *Illinois Steel Co.* (Ill.) 269

37. The filing in a suit to dissolve a corporation and close up its business, of cross-bills in the nature of creditors' bills, and of prayers to set aside a deed of trust on the property, will not operate to give the creditors praying such relief preference over the other creditors of the corporation. *Id.*

38. A party loaning money to an embarrassed corporation subsequently adjudged insolvent, and taking security therefor, cannot in equity claim a lien on its mortgaged property or the proceeds thereof, in preference to a pre-existing mortgage, no matter for what purpose the loan was made or how the money loaned was applied, providing the mortgage bondholders were not parties to the transaction. *Farmers' L. & T. Co.* v. *Bankers' & N. Teleg. Co.* (N. Y.) 403

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Dealing with director; preference of creditors. 497

Power of officers as to negotiable paper. 535

CORPSE. See also CORONER, NOTES AND BRIEFS.

1. A coroner may lawfully order a post mortem examination without the consent of the family of the deceased, where death has resulted from an injury which seems to him insufficient alone to produce death. *Young* v. *College of Physicians & S.* (Md.) 540

2. A post mortem examination made by a medical examiner in the exercise of his duty, when required by a coroner, does not render him liable for mutilating the body without the consent of the family of the deceased, if the work was done with ordinary decency and without wantonly disfiguring the body. *Id.*

COSTS.

1. A limitation of the amount of costs to $30 when the law determines their amount, under Wis. Rev. Stat. § 2918, subs. 7, § 2921, is erroneous. *Hayes* v. *Douglas County* (Wis.) 213

2. A city is not liable for costs in a suit to enforce an ordinance. *Carrollton* v. *Bazzette* (Ill.) 522

COTENANCY.

One of two tenants in common of a quantity of manure may rightfully take away his share without the intervention of a court to make the division. *Pickering* v. *Moore* (N. H.) 698

COUNTIES. See also CONSTITUTIONAL LAW, 25.

The expense of placing blocks of stone from a county in a state building at the Columbian World's Fair cannot be made a county tax. *Hayes* v. *Douglas County* (Wis.) 213

COURTS. See also DEBT.

1. An unconstitutional apportionment law may be declared void by the courts, notwithstanding the fact that such statute is an exercise of political power. *Denny* v. *State, Basler* (Ind.) 726

2. A court of equity will not assume to determine the constitutionality of a legislative act unless the case comes within some recog-

nized ground of equity jurisdiction, and presents some actual or threatened infringement of the rights of property on account of such unconstitutional legislation. *State, Taylor,* v. *Lord* (Or.) 473

3. No principle of comity requires state courts to refuse to take cognizance of an action on an undertaking to secure a stay of proceedings on appeal in an admiralty case. *Braithwaite* v. *Jordan* (N. D.) 238

4. A stipulation for value in a possessory action, unlike stipulations for value in other cases, can be enforced in any court having jurisdiction of an action of debt for the amount due on the stipulation. *Id.*

5. An action on an undertaking to secure a stay of proceedings on appeal in an admiralty case is not an integral part of the original case, or a proceeding to enforce the judgment therein, or within the exclusive jurisdiction of admiralty, but is within the jurisdiction of a state court. *Id.*

6. The appointment of a receiver by a Federal court after a judgment in a state court establishing a mechanic's lien against specific property and directing a sale of it to satisfy the demand will not defeat the right of the lien claimants to have the property sold on execution under the judgment. *Rogers & B. Hardware Co.* v. *Cleveland Bldg. Co.* (Mo.) 335

7. Courts have no power to make an arrangement of the business intercourse of common carriers such as they think ought to be made, because such function is legislative rather than judicial. *State, Board of Transportation,* v. *Sioux City, O. & W. R. Co.* (Neb.) 47

Causes of action arising in other country.

8. A court will not undertake to adjudicate rights which originated in any other state or country under statutes materially different from the law of the forum in relation to the same subject. *Mexican Nat. R. Co.* v. *Jackson* (Tex.) 276

9. It is for the court whose jurisdiction is invoked to determine whether or not the law of a foreign country by which the right claimed must be determined is such that it can properly and intelligently be administered by that court, with due regard to the rights of the parties. *Id.*

10. Jurisdiction of an action for personal injuries sustained in any other country by a railroad employee will not be entertained by a Texas court, where the foreign law which governs the case permits what is termed "extraordinary indemnity" in a sum which the judge might deem proper considering the plaintiff's social position, and also provides for subsequent judgments for additional damages afterwards arising out of the same injury, as well as for a reduction of the judgment in case of an increased earning capacity of the injured person. *Id.*

Rules of decision.

11. Courts will not assume to pass upon constitutional questions unless properly before them. *State, Taylor,* v. *Lord* (Or.) 473

12. The constitutionality of a statute giving women the right to hold office will not be passed upon in a collateral proceeding. *Stevens* v *Carter* (Or.) 342

13. The rule of *stare decisis* does not bind the court in deciding the constitutionality of a statute, where no property right or contract between the parties is involved. *Denny* v. *State, Baxter* (Ind.) 726

14. The construction of provisions of the Federal Constitution by the Supreme Court of the United States must be followed by the state courts in all matters to which such provisions are applicable. *State, Board of Transp.* v. *Sioux City, O & W. R. Co.* (Neb.) 47

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CREDITORS' BILL.

1. Creditors whose executions cannot be levied upon their debtor's property because it is in the hands of a receiver are not, because of failure to levy executions, precluded from attacking the validity of a deed of trust which has been given by the debtor as being in fraud of their rights. *Blair* v. *Illinois Steel Co.* (Ill.) 269

2. Jurisdiction to set aside a trust deed is acquired, although complainants in the original bill in which such relief was sought were not judgment creditors of the grantor, where a cross-bill to foreclose the deed is filed in the suit, making numerous parties defendants with a requirement to answer, which they do by attacking the deed, and upon issues so formed the question of the validity of the deed is submitted by the parties for decision. *Id.*

CRIMINAL LAW. See also CONFLICT OF LAWS, 4.

A fine of not less than $200 nor more than $1,000, and imprisonment for not less than ninety days nor more than one year, for violation of a restraining order under the South Carolina dispensary act of 1894, § 22, are not within the constitutional provision against excessive fines or cruel and unusual punishments. *Ex parte Keeler* (S. C.) 678

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See also BETTING.

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CROSS-BILL. See APPEAL AND ERROR, 1.

CUSTOM.

A usage to be good and one of which the courts will take judicial notice must be general and of such long standing as to have become a part of the law itself. *City Electric Street R. Co.* v. *First Nat. Exch. Bank* (Ark.) 535

DAMAGES.

1. General compensatory damages, and not merely nominal damages, may be recovered by a merchant or trader for the dishonor of his check when he had funds to meet it. *Svendsen* v. *State Bank* (Minn.) 552

2. The measure of damages for partial destruction of a building is the reasonable cost of restoring it so that it will be as valuable as it was before, considering its age and depreciation; and it is not the cost of a new building the same as that destroyed. *Anderson* v. *Miller* (Tenn.) 604

3. A verdict of $15,000 is not excessive for injury to a boy who was run over by a car and one of his legs crushed so that amputation was necessary. *Roth* v. *Union Depot Co.* (Wash.) 855

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DEATH. See ADMIRALTY, NOTES AND BRIEFS.

DEBT.

A common-law action of debt will not be denied on the ground that the plaintiff has in another tribunal a more speedy and simple remedy which is equally efficacious,—especially where this would deprive him of the right to a trial by jury. *Braithwaite* v. *Jordan* (N. D.) 238

DEDICATION.

The express refusal of a city to accept a plat with a certain strip designated thereon as a street, and the inclosure and use of one end of the strip as private property, on which the owners are compelled to pay assessments for improvements on another street, preclude a finding that this portion was a public road or street. *Mahler* v. *Brumder* (Wis.) 695

NOTES AND BRIEFS.

Dedication; of highway; acceptance of. 695

DEFENSE. See CONSTITUTIONAL LAW, 11, 12.

DEFINITION. See LICENSE, 2.

DEPUTY. See CLERK.

DESCENT AND DISTRIBUTION. See also CONFLICT OF LAWS, 1; WILLS, 3.

1. The common-law rule that one citizen cannot inherit from another where kinship must be traced through a nonresident alien cannot be rejected as repugnant or inapplicable to our institutions or the condition of things in this country, under a statutory adoption of the general principles of the common law so far as applicable. *Beavan* v. *Went* (Ill.) 85

2. A statutory provision that an estate shall descend in equal parts to next of kin does not make the descent to collateral kindred immediate so as to avoid the effect of alienage of ancestors through whom kinship is traced. *Id.*

3. *It seems* that one who becomes a domiciled resident of a foreign country becomes an alien within the operation of the law which excludes aliens from inheritance. *De Wolf* v. *Middleton* (R. I.) 146

4. The alienage of a son, which would prevent his inheritance at the time of the death of the testator, who made an executory devise to his heirs at law according to the statute of descents, will not exclude a descendant of the son from this class, where a statute passed before the time of determining the heirs has removed the disability of alienage. *Id.*

5. Nonresident aliens may inherit from an alien resident land situated in a state whose statutes prohibit nonresident aliens from acquiring title to land in the state, except that the widow and heirs of aliens who have acquired lands in the state may hold such lands by devise or descent for a period of ten years. *Easton* v. *Huott* (Iowa) 177

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DISCOVERY.

An order of court that a veterinary surgeon may be sent on the premises of a party against his will to examine a horse whose condition is in dispute, provided the owner or any person he may select shall accompany such surgeon, is in excess of the power of the court. *Martin* v. *Elliott* (Mich.) 169

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Order to enter premises for examination. 169

DISEASE. See ANIMALS, 4–6.

DIVORCE. See APPEAL AND ERROR, 1; JUDGMENT, 4; HUSBAND AND WIFE, 4, 5, NOTES AND BRIEFS.

DOWER. See WILLS, 4.

DRUNKENNESS. See CARRIERS, 8, 9.

ELECTION DISTRICTS. See also ESTOPPEL, 3.

1. The injustice of allowing but one representative to a county, while other counties having a similar population are given a voice in the election of more than one representative, must be avoided wherever possible. *Denny* v. *State, Basler* (Ind.) 726

2. Double districts in which two or more counties are grouped and given a voice in the election of more than one senator or representative, when neither of them has a voting population equal to the ratio for one senator or representative, cannot be created under Ind. Const. art. 4, § 5, requiring apportionment among counties according to the male inhabitants above twenty-one years of age, and § 6, providing that where more than one county shall constitute a district they must be contiguous. *Id.*

3. The approximation to the dual constitutional requirements of county representation and proportionate popular representation, in the enactment of an apportionment law by the legislature, is not reviewable by the courts except for gross abuse of discretion and providing both objects contemplated in the Constitution are kept in view. *Id.*

4. The obligation of observing a constitutional requirement as nearly as possible in an apportionment act becomes of binding force under the Constitution, when the exact requirement cannot be observed. *Id.*

5. The requirement that legislative apportionment shall be according to the number of inhabitants, in Ind. Const. art. 4, § 5, is no less binding than the provision that counties united in a district must be contiguous, or that no county for senatorial apportionment shall be divided. *Id.*

6. A valid apportionment law can be passed only once for each enumeration period, under Ind. Const. art. 4, § 4, providing for an enumeration every six years, and § 5, requiring an apportionment at the session next following the enumeration. *Id.*

7. An unconstitutional apportionment law, even if it has been declared constitutional by one of the lower state courts, will not preclude the enactment by the legislature of a valid apportionment law. *Id.*

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ELECTRICAL USES AND APPLIANCES. See also EVIDENCE, 5, 11, 12, 21-24; HIGHWAYS, 1; TRIAL, 14-16.

1. An electric-light company may be guilty of actionable negligence in failing to take proper steps to receive information concerning the condition of its wires, as well as in not repairing them within a reasonable time after receiving notice of their bad condition. *Mitchell* v. *Charleston Light & P. Co.* (S. C.) 577

2. The care exercised to prevent the escape of a dangerous current of electricity from wires suspended over streets in populous cities or towns must be commensurate with the great danger that exists, although the owners of such wires are not insurers against accidents. *City Electric Street R. Co.* v. *Conery* (Ark.) 570

3. The escape of electricity from wires suspended over streets, through any other wires that may come in contact with them, must be prevented so far as it can be done by the exercise of reasonable care and diligence. *Id.*

4. A grant of the privilege to encumber the public highway with poles and electric wires which, though insulated, carry a deadly current, imposes upon those having such privilege the duty of so managing affairs as not to injure persons lawfully on the streets, and of making the street substantially as safe for them as it was before. *Western U. Teleg. Co.* v. *State, Nelson* (Md.) 572

5. Reasonable care and caution in the use of an electric current by a street-railway company is required for the safety of the employees of an electric-light company which is engaged by the railway company to move electric lamps during the operation of the railway. *Huber* v. *La Crosse City R. Co.* (Wis.) 583

6. The coiling of a trolley wire over a span wire pending continuation of the line, thereby charging the span wire with electricity, is not negligence which will render the street-railway company liable to an experienced workman familiar with such wires and their insulation, who is injured by contact with the span wire while standing on a wooden pole moving electric lamps, where the span wire had circuit breaks to prevent its charging the iron posts which sustained it, and injury from it could be sustained only by one who completed the circuit between it and the iron posts by touching them both at the same time. *Id.*

7. A telephone company and an electric-railway company are jointly liable for negligence when both maintain their wires with knowledge of the danger caused by the want of guard wires between the trolley wire and a telephone wire insecurely suspended over it, and especially when they permit a broken telephone wire to remain suspended across the trolley wire. *McKay* v. *Southern Bell Teleph. & Teleg. Co.* (Ala.) 589

8. A telephone company is not excused for negligence in the maintenance of a wire insecurely fastened above a dangerous trolley wire, because the railroad company was chargeable with the duty of maintaining guard wires between the electric wires, and failed to do so. *Id.*

9. An electric-railway company maintaining a trolley wire charged with a dangerous current without guard wires between it and an insecure telephone wire over it, and negligently permitting the telephone wire to remain suspended over the trolley wire after it has fallen upon it, cannot escape liability by showing how other trolley wires are erected and maintained by prudent and well-managed electric-railway companies. *Id.*

NOTES AND BRIEFS.

Electrical uses; liability for injuries by electric wires in highways:—(I.) General rules; (II.) danger of current; (III.) degree of care; (IV.) liability for broken, fallen, or sagging

wires: (*a*) liability of owner; (*b*) presumption of negligence as to broken or fallen wires; (*c*) liability of party breaking them; (*d*) negligent delay in removing or repairing them; (*e*) municipal liability; (V.) failure to guard wires from falling wires of other owners; (VI.) concurrent liability: (VII.) wires charged by lightning; (VIII.) contributory negligence. 566

Police regulation of electric companies:—(I.) In general; (II.) as to the occupation of highways or waters; (III.) as to guard wires; (IV.) as to the operation of electric lines; (V.) limitation of the police power: (*a*) limitations in state Constitutions: (1) impairment of obligation of contracts; (2) deprivation of property without due process of law; (3) class legislation: (*b*) limitations in Federal Constitution: (1) statutes requiring electric wires to be put underground; (2) statutes imposing penalties upon telegraph companies for not transmitting and delivering message properly; (3) statutes regulating telephone prices and requiring service on equal terms to all; (4) statutes imposing license fees on telegraph companies. 798

ELECTRIC LIGHTS. See ELECTRICAL USES AND APPLIANCES, 1; MUNICIPAL CORPORATIONS, 7–11.

ELECTRIC RAILWAYS. See CARRIERS, 11.

ELEVATED RAILWAYS. See INJUNCTION, 2.

EMBEZZLEMENT. See BANKS, 3.

EMINENT DOMAIN.

1. The connection of mines and ore houses with a market is a public use in Montana, which will authorize a railroad company to acquire a right of way for that purpose by right of eminent domain. *Butte, A. & P. R. Co.* v. *Montana U. R. Co.* (Mont.) 298

2. The magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad in Montana to construct branches to mines and mining works as public uses, by virtue of the law of eminent domain. *Id.*

3. The exercise of the right of eminent domain to acquire land for a railroad is not precluded by the facts that the road is owned by a private corporation and is built for the benefit of private mines and ore houses, where the state laws make all railroads public highways, open to use by all who wish to do so. *Id.*

4. The use for which property already held for public use may be condemned need not be a different one, under a statute permitting such condemnation for a more necessary public use. *Id.*

5. Land belonging to a railroad company by way of easement, and not actually in use by it or not actually necessary for the enjoyment of its franchise, is, with respect to the power of eminent domain, upon the same footing as the land of an individual citizen, if there is a necessity that it should be taken for another use. *Id.*

6. Absolute necessity is not necessary to enable one railroad to condemn a portion of another's right of way for its tracks, under a statute forbidding such appropriation unless the use to which it is to be applied is a "more necessary public use." *Id.*

7. A case of necessity is presented, within Mont. Code Civ. Proc. § 601, permitting one railroad company to condemn a portion of the right of way of another, when the latter, traversing a mountain side in a mining section, has within its right of way tracks unused and in all reasonable probability not necessary for future use, and another road seeking the same objective point is obliged to take a part of such right of way to avoid circuity, a different grade, much greater cost, and serious damage to mining properties, and would be obliged in any event to parallel the adversary road a part of the way. *Id.*

8. A railroad to be constructed along the side of a mountain may be permitted to condemn for its right of way a portion of the right of way of a former road, where such portion is occupied by unexcavated rock and dirt, and there is no immediate prospect of the other road needing it, and its tracks are to be placed far enough away from the other's so as not to interfere with its operations; while that location is by far the most practicable that can be found, any other route would impinge as much upon the other road as this does, would affect many mining operations, would be enormously expensive, less convenient, and the one chosen manifestly best serves the interests of the public. *Id.*

9. A street may be opened across depot grounds of a railroad company, under general authority conferred on cities and towns for opening streets and condemning lands for such purposes without any express provision as to crossing railroads, where the inconvenience to the company will be inconsiderable as compared with the benefit to the public. *Chicago, M. & St. P. R. Co.* v. *Starkweather* (Iowa) 183

10. The question of damages to be awarded upon the crossing of one railroad by another may be referred to commissioners, under a statute providing that courts may regulate and determine the place and manner of making crossings. *Butte, A. & P. R. Co.* v. *Montana U. R. Co.* (Mont.) 298

NOTES AND BRIEFS.

Eminent domain; by railroad; taking land of other company. 302

EQUITY. See also COURTS, 2.

Equity cannot be successfully invoked to inflict injury or damage to the defendant, without securing any substantial right or benefit to the plaintiff. *Mahler* v. *Brumder* (Wis.) 695

NOTES AND BRIEFS.

Equity; remedy in, barred by usury. 706

ESTOPPEL. See also ACTION OR SUIT, 4.

1. After an insurance organization has been allowed to proceed in its business, with full knowledge and acquiescence of the insurance authorities of the state, for a series of years, during which many of its members have by

age and disability become unable to procure any other insurance, a rival organization which has all the time had knowledge of the facts and failed to take action is estopped from contesting the legality of such business. *Grand Lodge A. O. U. W.* v. *Graham* (Iowa) 133

2. Affidavits stating that at the time of marriage the affiant was the wife of another man do not estop her from subsequently denying that fact and explaining that the affidavits were made upon the strength of a rumor. *Hunter* v. *Hunter* (Cal.) 411

3. The people of the state cannot be estopped from asking for a determination of the validity of an apportionment law, by failing to bring the matter to a decision until after a legislature has been chosen in pursuance of the act. *Denny* v. *State, Basler* (Ind.) 726

NOTES AND BRIEFS.

Estoppel; by decree of divorce. 412

EVIDENCE.

Judicial notice.

1. Courts will not take judicial knowledge of the laws of another state under which a corporation is claimed to have been created, but proof of such laws must be made. *Duke* v. *Taylor* (Fla.) 484

2. Judicial notice will be taken of a census or other enumeration made under the authority of the state or of the United States, and also of the location, boundaries, and juxtaposition of the several counties of the state. *Denny* v. *State, Basler* (Ind.) 726

3. The court can take notice of its own records in another case, either on suggestion of counsel or upon its own motion. *Id.*

4. It is matter of common knowledge that property lying in the vicinity of a street improvement often derives important benefits therefrom, although not fronting upon or directly contiguous thereto. *Hayes* v. *Douglas County* (Wis.) 213

5. It is a matter of common knowledge that electricity is used for the purpose of transmitting sound by telephone and messages by telegraph, and also for generating light and producing power. *State, Laclede Gaslight Co.* v. *Murphy* (Mo.) 798

6. Jurors cannot act upon their personal knowledge of the mental condition of one accused of perjury, in arriving at a verdict. *State* v. *Gaymon* (S. C.) 489

Presumptions and burden of proof.

7. A statute prescribing the circumstances that shall constitute prima facie evidence of a fact in issue on trial in the courts of the state is within the authority of the legislature, and may be made applicable to a cause of action which arose outside of the state. *Pennsylvania Co.* v. *McCann* (Ohio) 651

8. Injury to a passenger on a train is prima facie evidence of the carrier's negligence. *Baltimore & P. R. Co.* v. *Swann* (Md.) 313

9. The rule that defects in railroad apparatus shall be prima facie evidence of negligence on the part of the corporation in an action for injuries received by an employee, which is prescribed by the Ohio act of April 2, 1890, regulating railroads in the state, applies to all railroad companies any part of whose line of railway extends into the state, whether the injury complained of was received within or without the state. *Pennsylvania Co.* v. *McCann* (Ohio) 651

10. The burden of showing that plaintiff's fence was defective when entered by defendant's cattle cannot be cast upon the defendant in an action of trespass. *Clarendon Land, I. & A. Co.* v. *McClelland* (Tex.) 669

11. An injury from contact with a broken telephone wire hanging over and in contact with the feed wire of an electric railway affords a prima facie presumption of negligence on the part of the owners of the wires. *Western U. Teleg. Co.* v. *State, Nelson* (Md.) 572

12. That an electric wire had become disconnected or detached from its fastening, and hung down in a public alley so as to endanger public travel, is of itself prima facie evidence of negligence upon the part of the company maintaining it. *Denver Consol. Elec. Co.* v. *Simpson* (Colo.) 566

13. The presumption in favor of the legality of a marriage regularly solemnized will prevail over the presumption of the continuance of the life of a former husband who has been absent and unheard of for less than seven years. *Hunter* v. *Hunter* (Cal.) 411

14. That a note is executed by persons as president and secretary of a company which is the purported maker does not create a presumption that it is a corporation rather than a partnership. *Duke* v. *Taylor* (Fla.) 484

Best; documentary.

15. The commission of the governor of Florida is the best evidence in mandamus proceedings, of the person entitled to the office, until it is annulled by a judicial determination in proceedings in the nature of quo warranto. *State, Lamar,* v. *Johnson* (Fla.) 357

16. Upon the trial of one charged as being accessory to a crime, the record of the conviction of the alleged principal is admissible as prima facie evidence that the latter committed the crime as charged. *State* v. *Gleim* (Mont.) 294

17. A copy of proofs of loss mailed to an insurance company, and a postal card acknowledging their receipt, are admissible in evidence to show that the proofs were seasonably furnished, although the proofs will not be competent evidence of the facts therein contained. *Dowling* v. *Lancashire Ins. Co.* (Wis.) 112

Relevancy and weight.

18. Testimony of a funeral director that he never received a body after post mortem examination that was in condition for the family to see, without being prepared, is admissible in an action for unlawfully cutting and mutilating a body by post mortem examination. *Young* v. *College of Physicians & S.* (Md.) 540

19. Evidence that defendant, charged with murder, had filed a motion for continuance for the absence of an alleged material witness, and that his attorneys, when notified that they might take the testimony of such witness to be used on an application for bail, took no steps

to procure it,—is inadmissible. *Rogers* v. *State* (Ark.) 465

20. Testimony that a person controlled and directed the voting of stock standing in the name of another is admissible in support of a claim by the former that it was given to him. *Leyson* v. *Davis* (Mont.) 429

21. Evidence that notice was given to an electric company prior to an accident from a fallen wire, that the wire was down, is admissible upon the issue of negligence in omitting to exercise due care in building the line and in failing to maintain it in good repair. *Denver Consol. Elec. Co.* v. *Simpson* (Colo.) 566

22. Direct proof that defendants, charged with negligence in respect to electric wires, were the parties who maintained them, is not necessary when the defendants, although pleading the general issue, impliedly admit that fact by the conduct of the trial, including cross-examination of witnesses, and fail to suggest that the wires were maintained by any other parties. *McKay* v. *Southern Bell Teleph. & Teleg. Co.* (Ala.) 589

23. That a broken telephone wire from which a person received a deadly charge of electricity obtained the electric charge from its contact with the feed wire of an electric railway may be inferred by the jury without violence, on evidence that it had been hanging over the feed wire for two weeks and rubbing against it when swayed by the wind, although the insulation of the feed wire is not proved to be imperfect, where there is nothing to show any other source of the electric charge. *Western U. Teleg. Co.* v. *State, Nelson* (Md.) 572

24. Evidence that electricity was communicated from a trolley wire to a telephone wire may be sufficient without any positive testimony as to their contact, when it is shown that the telephone wire hung over the other and became broken so that one end rested on the ground, where there is no other reasonable theory to explain how the telephone wire became charged with electricity. *City Electric Street R. Co.* v. *Conery* (Ark.) 570

25. To produce moral certainty the evidence must be such that the juror would venture to act upon the conviction produced by it, in matters of the highest concern and importance to his own interests. *State* v. *Gleim* (Mont.) 294

NOTES AND BRIEFS.

See also WITNESSES.

Evidence; the right of jurors to act on their own knowledge of the facts in or relevant to the issue:—(I.) The general rule; (II.) modification thereof: (*a*) in general; (*b*) as to intoxicating liquors; (*c*) as to witnesses. 489

Of conviction of principal defendant on trial of accessory. 295

Burden of proof as to. 332

Burden of proof as to marriage. 412

EXECUTION. See JUDICIAL SALE, 2; LEVY AND SEIZURE, 1.

EXECUTORS AND ADMINISTRATORS.

All wages due a clerk for services rendered before as well as during the last illness of a deceased employer fall within the second class of claims against his estate, and are included in the term "wages of servants," as used in § 80 of the "Kansas Act Respecting Executors and Administrators and the Settlement of the Estates of Deceased Persons." *Cawood* v. *Wolfley* (Kan.) 538

NOTES AND BRIEFS.

Executors and administrators; classification of claims for wages. 538

EXPLOSION. See also GAS.

NOTES AND BRIEFS.

Of gas, liability for. 785

EXPRESS COMPANY. See CARRIERS, 10.

NOTES AND BRIEFS.

Liability for abuse of customer by agent. 390

FALSE IMPRISONMENT. See MASTER AND SERVANT, 1, 2.

FENCES. See ANIMALS, 3; EVIDENCE, 10; NUISANCES, 2.

FINE. See CRIMINAL LAW.

FIRE. See ACTION OR SUIT, 3; LANDLORD AND TENANT, 1; PROXIMATE CAUSE, 2.

FOLDING BED. See CASE.

FORFEITURE. See MINES, NOTES AND BRIEFS; SUNDAY.

FORGERY.

Signing another's name as his agent, and adding one's own initials to show agency, in the presence of the person who pays over money on the faith of such signature, is not forgery, although the claim of authority is false and may constitute some other crime. *People* v. *Bendit* (Cal.) 831

NOTES AND BRIEFS.

Forgery; by false assumption of authority in signing another's name as agent for him. 831

FRAUD.

1. It is not fraud for one creditor to try to keep another ignorant of a trade he is seeking to make with the debtor for no other purpose than his own protection. *Rice* v. *Wood* (Ark.) 609

2. Fraud cannot be imputed to an honest creditor because in taking his debtor's stock of goods to settle his claim he advised him to keep the money he had in bank and his accounts. *Id.*

NOTES AND BRIEFS.

Fraud; liability for false representations. 220

As ground of injunction against judgment when it was a defense to the original action. 747

Participation by creditor in fraudulent intent of debtor which will make a transfer to pay or secure his debt invalid as to other creditors:—(I.) Necessity of participation; general doctrine: (II.) who are bona fide purchasers within the statute; (III.) what constitutes participation: (*a*) generally; (*b*) securing a preference; (*c*) knowledge of fraud, insolvency, etc.; (*d*) assumption of other debts as part of purchase price; (*e*) amount of property taken; (*f*) allowance of fair price; (*g*) security greater in value than debt; (*h*) security for overstated debt; (*i*) security for present and future advances; (*j*) inclusion of simulated debts; (*k*) reservation of benefits; (*l*) taking conveyance fraudulent on its face; (*m*) retention of possession; (*n*) failure to record; (*o*) other circumstances and conditions tending to show participation; (IV.) participation by agent; (V.) participation as between trustees and beneficiaries; (VI.) participation by one of several beneficiaries; (VII.) effect of other accompanying purposes besides that to defraud; (VIII.) effect of relationship or intimacy of the parties; (IX.) conveyances taken from a fraudulent grantee; (X.) presumption and burden of proof; (XI.) participation under bankruptcy and insolvency laws. 609

GAS. See also LIFE TENANTS; MINES.

A gas company is guilty of negligence rendering it liable for injuries from an explosion of gas which has escaped from its pipes under a sidewalk into a cellar, in the absence of contributory negligence, where the fact that the gas was escaping was called to the attention of two of its employees who, without making any investigation, assumed that it was due to a defective meter and merely furnished a new meter. *Consolidated Gas Co.* v. *Crocker* (Md.) 785

NOTES AND BRIEFS.

See also MINES.

Gas; negligence in respect to. 785

GIFT. See also CHARITIES, 2, 3.

1. A gift *causa mortis* is not limited to the event of the donor's failure to return from a trip on which he is about to start, by his statement that he wants the donee to have it if he does not come back or if anything happens, where this remark is made after an actual delivery without qualification of the gift, and in response to encouraging words respecting his prospects of life. *Leyson* v. *Davis* (Mont.) 429

2. A gift of shares of stock in a national bank may be made *causa mortis* by actual delivery as a gift, without indorsement on the certificates or any assignment in writing or transfer on the books of the company,—at least where there is no assignment or power of attorney on the back of the certificates, and the by laws require no blank for such purpose, or nothing except a transfer on the books of the bank. *Id.*

3. Certificates of stock in a bank are sufficiently delivered to sustain a gift *causa mortis* when handed to the donee by the donor, with words indicating a gift in case of the donor's death, spoken on the eve of the latter's departure on a trip which was but a desperate fight for life, or to prolong the life which he felt that he must soon lose. *Id.*

4. A gift of shares of stock *causa mortis* is not defeated by the subsequent use, without the donor's knowledge or consent, of a proxy executed by him before the gift was made, when it is filled out by the donee and the voting upon it is done under his directions. *Id.*

NOTES AND BRIEFS.

Gift; *causa mortis*, of bank stock. 436

GOVERNOR.

NOTES AND BRIEFS.

Injunction against. 474

GUARANTY.

A guaranty of the payment of interest on a note runs only until the maturity of the note. *Rector* v. *McCarthy* (Ark.) 121

NOTES AND BRIEFS.

Guaranty; of interest, construction of. 131

GUARDIAN AND WARD.

No notice to an infant under fourteen years of age is necessary in a proceeding for the appointment of a guardian of the person of such child. *Board of Children's Guardians* v. *Shutter* (Ind.) 740

HABEAS CORPUS.

1. Release from imprisonment for contempt of court cannot be obtained by habeas corpus, unless the proceedings in which the person was adjudged guilty of contempt are null and void, in whole or in part. *Ex parte Keeler* (S. C.) 678

2. A prisoner committed by a justice of the peace for trial by the county court on the charge of a misdemeanor which is exclusively within the jurisdiction of the justice is entitled to release by habeas corpus. *Ex parte Lacy* (Va.) 822

HEALTH. See CONSTITUTIONAL LAW, 20 22; CORPSE.

HIGHWAYS. See also DEDICATION; EMINENT DOMAIN, 9; NUISANCES, 2.

1. The right to lay electric-light wires in the streets of a city by virtue of a franchise to lay pipes, fixtures, or other things for the purpose of lighting the city, is subject to the municipal control of the streets and the general police power to regulate and restrict the manner in which such wires, tubes, and cables may be secured or supported and insulated,—especially when the franchise was given before the use of electricity for such purposes was known. *State, Laclede Gaslight Co.* v. *Murphy* (Mo.) 798

2. Road commissioners, who under the Massachusetts statute have in respect to roads the powers formerly possessed by selectmen and surveyors of highways, are, while acting within the scope of their powers and duties, public officers, and not servants of the town

for whose acts the town is liable. *McManus* v. *Weston* (Mass.) 174

3. Acts in the nature of repairs to or improvements of an existing way are within the terms "making and repairing," in a statute conferring power on road commissioners, so that in performing them they will act as public officers, although the work is ordered by the county commissioners, is unusual and extensive in character, and provided for by a special appropriation by the town, and a statute requires towns to complete roads according to the lay-out or order of the county commissioners. *Id.*

NOTES AND BRIEFS.

As to injuries from electric wires in, see ELECTRICAL USES.

See also RAILROADS.

Highways; liability for acts of commissioners. 174

Private action for obstruction of. 695

Police regulation as to use of, by electric wires. 798

HOGS. See CONSTITUTIONAL LAW, 17, 24, 25.

HOMESTEAD.

The owner of a part of an undivided block in a city where other blocks are subdivided into lots is entitled to hold as a homestead only a tract equal in area to the average size of platted lots in that part of the city. *Heidel* v. *Benedict* (Minn.) 422

HOMICIDE.

One who fires a shot necessarily fatal, in self defense, is not guilty of homicide in firing another shot which also would be fatal, after the other party has abandoned the conflict, where the last shot did not contribute to or hasten death. *Rogers* v. *State* (Ark.) 465

HORSE RACE. See COMMERCE, 2; CONFLICT OF LAWS, 4.

HOSPITAL. See CHARITIES, 1.

HOUSE OF CORRECTION. See WATERS, 3.

HUSBAND AND WIFE. See also CONTRACTS, 5, 6; ESTOPPEL, 2; EVIDENCE, 13; JUDGMENT, 4.

1. The power of the legislature over the subject of marriage as a civil status is unlimited and supreme, except as restricted by the Constitution. *State* v. *Duket* (Wis.) 515

2. A statute providing that a sentence to imprisonment for life shall operate as an absolute dissolution of the marriage of the party does not violate the provision of Wis. Const. art. 4, § 24, that the legislature shall never grant any divorce. *Id.*

3. The reversal of a sentence to imprisonment for life on account of error, but not for want of jurisdiction, does not operate to restore the marriage relation of the convict, which had been dissolved by the sentence under Wis. Rev. Stat. § 2355. *Id.*

4. A divorce from a wife for "utter desertion continued for three consecutive years" may be granted under Me. Rev. Stat. chap. 60, § 2, where she deserts her husband and remains away from him for the full period continuously, and unreasonably refuses to return, although once during that time he visits her and for two or three nights occupies the same bed with her. *Danforth* v. *Danforth* (Me.) 608

5. A nonresident defendant in a divorce suit brought by a resident of the state may be granted a divorce on a cross-bill, although the marriage and cause of divorce took place out of the state and the general provisions in How. (Mich.) Ann. Stat. § 6231, say that in such case a divorce shall not be granted unless the party exhibiting the petition or bill therefor has resided in the state one year. *Clutton* v. *Clutton* (Mich.) 160

NOTES AND BRIEFS.

Husband and wife; jurisdiction for divorce where one party is a nonresident. 160

Validity of marriage; effect of divorce as an estoppel. 412

Divorce for desertion. 608

The effect of a conviction and sentence of either husband or wife upon the marriage relation:—(I.) In general; (II.) necessity of a conviction; (III.) effect of an appeal from a conviction; (IV.) effect of commutation of the sentence or of a pardon; (V.) conviction in another state; (VI.) retroactive effect of statute; (VII.) allegation of infamous crime; (VIII.) where crime is prior to marriage; (IX.) conviction as desertion; (X.) classed with cruelty; (XI.) conviction as a bar to divorce by the party convicted. 515

INCOMPETENT PERSONS. See INSURANCE, 2.

INDICTMENT.

The statutory abolition of the distinction between accessories before the fact and principals will not render a subsequent indictment charging a person as being an accessory in common-law form insufficient. *State* v. *Gleim* (Mont.) 294

NOTES AND BRIEFS.

Indictment; against accessory. 294

INFANTS. See also GUARDIAN AND WARD; NEGLIGENCE, 1; RAILROADS, 4.

The guardianship, custody, and control of minors being within the jurisdiction of the circuit court in Indiana, its judgment committing an infant to the custody of a board of children's guardians is not void on collateral attack, although it assumes to act under an unconstitutional statute. *Board of Children's Guardians* v. *Shutter* (Ind.) 740

INFORMATION. See ATTORNEY GENERAL.

INJUNCTION. See also APPEAL AND ERROR, 18; CLERK; TRIAL, 1.

1. An injunction against a wrongful or fraudulent imitation of a distinctive label used by a manufacturer or trader can be granted, although the label is not a trademark and contains no word, sign, or symbol which can be protected as such. *Scott* v. *Standard Oil Co.* (Ala.) 374

2. An injunction will not be granted in favor of an abutting owner against the maintenance of an elevated railroad in a street in front of his property, interfering with easements in the street appurtenant to his property without making compensation therefor, where he is unable to show any actual damage to his property, or loss suffered by reason of the presence and operation of the railroad, because on account of it the value of his property has increased greatly and in proportion to the general increase of values of property in the vicinity. *O'Reilly* v. *New York Elev. R. Co.* (N. Y.) 407

3. The connection of a sewer underdraining a cemetery with a spring brook, water from which is used for domestic purposes, watering animals, and making ice for domestic use, may be enjoined at the instance of riparian owners who will be injured by it. *Barrett* v. *Mt. Greenwood Cemetery Asso.* (Ill.) 109

4. An injunction to prevent the connection of a sewer with a spring brook the water of which is used for domestic purposes will not be refused because the water is already polluted to some extent from other sources. *Id.*

To protect personal rights; privacy.

5. The jurisdiction of equity to grant injunctions is founded on rights of property, and does not extend to a matter affecting an exclusively personal right. *Corliss* v. *E. W. Walker Co.* (C. C. D. Mass.) 283

6. There is no such real mental distress or injury as will justify equity in enjoining a violation of the right of privacy by making a statue of one of plaintiff's relatives, if the facts fail to furnish any clear or sure foundation for a reasonable man to claim that any injury to his feelings has been or would be caused by the action taken or to be taken by defendant. *Schuyler* v. *Curtis* (N. Y.) 286

7. The use of plates made from a picture or photograph, for insertion in a publication, will be enjoined where the pictures were obtained on conditions which have not been complied with, as the publication would be a violation of confidence, or breach of contract. *Corliss* v. *E. W. Walker Co.* (C. C. D. Mass.) 283

8. Erroneous claims respecting the services of a deceased person in whose honor persons are seeking to erect a memorial, which cause adverse newspaper comment, furnish no ground for injunction against the memorial in favor of her relatives, who have made no attempt to rectify the error. *Schuyler* v. *Curtis* (N. Y.) 286

9. Relatives of a deceased person cannot enjoin the erection of a memorial to her because the work is undertaken without their consent by strangers, if there is an honest purpose to do honor to her, which is carried out in an appropriate and orderly manner by reputable individuals. *Id.*

10. That the erection of a statue in his honor would have been disagreeable to a person's ancestor in his lifetime is not a sufficient cause for real mental injury or distress to such person because of the erection of such statue after such ancestor's death, to entitle such person to enjoin such erection. *Id.*

11. The making of a bust of a deceased person will not be enjoined on the ground of fraud upon the public because no likeness of her is accessible for a model, if the idea of actual likeness has been abandoned and the bust is to be made an ideal one,—at least where no fraudulent intent is shown. *Id.*

12. No ground for enjoining the making by a woman's society of a bust of a deceased woman, in favor of her descendants, is shown by the fact that the same society contemplates the exhibition of the bust in the same room of a public fair building in which they are to exhibit one of another woman with whose objects and work the ancestor had no sympathy, if the two busts are designed to represent totally distinct classes of persons. *Id.*

Against officers.

13. The state suing in its corporate capacity for the protection of its property rights stands in no different or better position than an individual in respect to an injunction against public officers. *State, Taylor,* v. *Lord* (Or.) 473

14. A private individual cannot have public officers enjoined from using public funds, unless some civil or property rights are being invaded, or, in other words, he is going to get hurt by the transaction. *Id.*

15. A commission named by the legislature, of which the governor is a constituent part, and which is empowered to perform service which it would otherwise be the duty of the governor to perform, and which is governmental in its nature, pertaining to *publici juris*, and affecting the welfare of the people at large,—is not subject to an injunction from the courts. *Id.*

16. The location of a site for a public institution, the purchase of a tract of land therefor at that place, the employment of an architect to draw plans, etc., for the building, and the letting of contracts therefor by a commission of which the governor is a member,—are matters governmental and executive in their nature, with which the courts cannot interfere by injunction. *Id.*

17. An injunction against the enforcement of a tax levy because of an irregularity, even if it renders the levy void, will not be granted unless the tax is excessive or unequal and unjust. *Hayes* v. *Douglas County* (Wis.) 213

Against judgments.

18. Although a judgment of a justice of the peace is void because he has no jurisdiction of defendant, yet its execution will not be enjoined if defendant has a right to a writ of certiorari to set the judgment aside. *Texas Mexican R. Co.* v. *Wright* (Tex.) 200

19. A judgment at law will not be enjoined on the ground of fraud where it does not appear that such judgment is inequitable, or it is

disclosed that plaintiff had failed to exercise due diligence in asserting his rights. *Norwegian Plow Co.* v. *Bollman* (Neb.) 747

20. A judgment regularly rendered, even though by default and on a note given for a gambling consideration, is binding as against the parties and their privies, and its enforcement will not be restrained by a court of equity. *Owens* v. *Van Winkle Gin & M. Co.* (Ga.) 767

21. No injunction against a default judgment is justified by the facts that defendant submitted the facts constituting his defense to an attorney, with the request to prepare an answer, and then went to his home in another county relying on the attorney's promise to do so, but that for some reason unknown to defendant the answer was not filed. *Payton* v. *McQuown* (Ky.) 33

22. A suit to enjoin a judgment against a surety will not lie on the ground that the principal's liability has been subsequently discharged, where a statute permits the surety under such circumstances to file a bill to review the judgment against him for newly discovered matter, without affecting that in favor of his principal. *Michener* v. *Springfield Engine & T. Co.* (Ind.) 59

NOTES AND BRIEFS.

Injunction; negligence as a cause and as a bar to injunction against judgments:—(I.) As a cause for injunction against judgments; (II.) as a bar to injunctions against judgments: (*a*) in attending court; (*b*) in employing an attorney; (*c*) of attorney; (*d*) in ascertaining a defense; (*e*) in regard to evidence; (*f*) in asserting a defense; (*g*) delay in seeking. 33

Enjoining judgments against or in favor of sureties:—(I.) Against sureties: (*a*) remedy at law as a bar to injunction; (*b*) valid defense must be shown; (*c*) in matters of negligence or for failure to make a legal defense; (*d*) in summary proceedings; (*e*) for newly discovered evidence; (*f*) where defense was prevented; (*g*) for equitable defenses; (*h*) on account of statutes; (*i*) pleading and parties; (*j*) injunction bonds; (II.) in favor of sureties. 59

Against judgments for want of jurisdiction, or which are void:—(I.) In general; (II.) as to party; (III.) as to time; (IV.) as to venue; (V.) as to amount; (VI.) matter of process and service: (*a*) form; (*b*) time and manner; (*c*) fraud as to service; (*d*) acceptance of service; (*e*) party served; (*f*) service on corporation; (*g*) service on partners; (*h*) service at residence; (*i*) where there was no service as required by law; (*j*) where there was no notice; (VII.) on account of appearance; (IX.) pleading and practice; (X.) where there was no judgment or it was set aside. 200

Against judgments for defenses existing prior to their rendition:—(I.) Failure of consideration: (*a*) generally; (*b*) in judgments for purchase money: (1) insolvency; (2) nonresidence; (3) rescission; (4) mistake; (5) title bonds; (6) defective title generally; (7) deficiency in amount of land; (8) fraud; (9) *res judicata;* (10) no cause of action for injunction; (11) sales by executors and administrators; (12) summary judgments; (13) court sales; (*c*) judgments in favor of purchasers; (II.) fraud: (*a*) where the defense is forgery or *non est factum;* (*b*) in obtaining a contract; (*c*) generally; (III.) public policy: (*a*) generally; (*b*) debt for Confederate money; (*c*) gambling debts; (*d*) usury; (IV.) set-off: (*a*) failure to assert at law; (*b*) parties; (*c*) unliquidated damages; (*d*) trial at law; (*e*) no set-off; (*f*) insolvency and nonresidence; (*g*) accounting; (*h*) equitable set-off; (*i*) in matters of an estate; (*j*) mutual agreements; (V.) payment: (*a*) failure to defend; (*b*) defense made; (*c*) equitable defenses; (*d*) summary proceedings; (*e*) pleading bill of discovery; (VI.) conditions; (VII.) partition and dower; (VIII.) as to party; (IX.) title to property; (X.) nonliability in general. 747

Against elevated railroad; to prevent multiplicity of actions. 407

To restrain executive action. 474

INSANITY. See INSURANCE, 2.

INSOLVENCY.

A bill of sale in satisfaction of debts cannot be turned into an assignment by the fact that the creditor agrees to pay other claims against the debtor, if the inability is absolute and not dependent on the disposition made of the property. *Rice* v. *Wood* (Ark.) 609

INSURANCE. See also ACTION OR SUIT, 3; CONSTITUTIONAL LAW, 2; ESTOPPEL, 1.

1. Issuing an insurance policy when the insurance agent has full knowledge of the existence of encumbrances is a waiver of conditions in the policy against such encumbrances. *Dowling* v. *Lancashire Ins. Co.* (Wis.) 112

2. The right of recovery of an insane beneficiary under a policy of life insurance is not forfeited by his killing the insured under such circumstances as would cause the killing to be murder if he were sane. *Holdom* v. *Ancient Order United Workmen* (Ill.) 67

3. A provision that death "from accidents that shall bear no external and visible marks" is not insured against by a life insurance policy means that there must be external and visible evidence that death was accidental, and does not exclude liability for death caused by accidentally and involuntarily breathing illuminating gas while asleep. *Menneiley* v. *Employers' Liability Assur. Corp.* (N. Y.) 686

4. A provision that death "from anything accidentally taken, administered, or inhaled" is not insured against, applies only where something has been voluntarily and intentionally although mistakenly taken, administered, or inhaled. *Id.*

5. The words "inhaling gas," in a provision describing causes of death against which a policy does not insure, apply only to cases where gas is inhaled intentionally, voluntarily, and consciously. *Id.*

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Insurance; forfeiture by act of insane beneficiary. 68

Subrogation of insurer to action against party causing loss. 604
Accident; inhaling gas. 686

INTEREST.

Unearned interest must be subtracted from the amount of recovery, in entering judgment before maturity by the voluntary act of the payee of notes on which interest has been paid in advance. *Illinois Steel Co.* v. *O'Donnell* (Ill.) 265

INTOXICATING LIQUORS.

The distribution of intoxicating liquors to members of a social club upon the written order of a member at a price fixed by the officers of the club, designed to cover the purchase price and disbursements in serving, where the club was incorporated for a legitimate purpose to which the furnishing of liquors to its members is merely incidental, does not constitute a sale within the meaning of N. Y. Laws 1892, chap. 401, prohibiting sales of such liquors without a license, but making no provision whereby such a club can obtain a license. *People* v. *Adelphi Club* (N. Y.) 510

NOTES AND BRIEFS.

Intoxicating liquors; rights of jurors to act on their own knowledge of. 489
Validity of sale by club. 510

ISLANDS. See WATERS, 1

ITINERANT MERCHANTS. See COMMERCE, 4; LICENSE, 2, 3.

JUDGE. See WITNESSES, NOTES AND BRIEFS.

JUDGMENT. See also INFANTS; INJUNCTION, 18-22; INTEREST.

1. A judgment in an action brought by an individual is not conclusive in a subsequent action to which he is not a party or even a relator, although both cases turn on the constitutionality of a statute. *Denny* v. *State, Basler* (Ind.) 726

2. A judgment is not necessarily void because the court bases it on a void statute, if the court has jurisdiction of the subject derived from other sources. *Board of Children's Guardians* v. *Shutter* (Ind.) 740

3. The determination of a motion is not *res judicata* so as to prevent the parties from drawing the same matters in question again in the action. *Heidel* v. *Benedict* (Minn.) 422

4. A decree of divorce in favor of a wife, rendered without service on the husband and when his whereabouts were unknown, does not estop her from alleging subsequently that he was dead before the divorce was granted. *Hunter* v. *Hunter* (Cal.) 411

5. A surety against whom a default judgment is taken, after which the principal's liability is discharged for failure of consideration, may file a bill under Ind. Rev. Stat. 1894, § 627, to review the judgment against him for newly discovered matter, without disturbing that in favor of his principal. *Michener* v. *Springfield Engine & T. Co.* (Ind.) 59

NOTES AND BRIEFS.

Judgment; injunction against, see INJUNCTION.
Of divorce; effect as estoppel. 412

JUDICIAL SALE.

1. A purchaser at chancery sale of the unexpired term of a leasehold is not chargeable with the contract rental of the original lease for the balance of the term. *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co.* (Tenn.) 593

2. A sheriff's sale for $250, of property worth from $40,000 to $50,000, under a description so misleading that the sheriff did not know what property he was selling, on account of which he failed to give notice according to his custom to mortgagees, who had paid off or compromised other liens on the property and supposed that all were thus satisfied,—may be set aside on the application of such mortgagees although the owner of the fee of the property, who is insolvent, does not complain. *Rogers & B. Hardware Co.* v. *Cleveland Bldg. Co.* (Mo.) 335

JURORS. See EVIDENCE, 6, NOTES AND BRIEFS; TRIAL, 1, 2.

JUSTICE OF THE PEACE.

NOTES AND BRIEFS.

See also WITNESSES.

Power of, to order post mortem examination. 543

LABEL. See INJUNCTION, 1.

LACHES. See LIMITATION OF ACTIONS, 1.

LANDLORD AND TENANT. See also ACCESSION; JUDICIAL SALE, 1; MINES; RECEIVERS, 2.

1. The unauthorized storage of cotton by a tenant in a building hired for the storage of vehicles makes him liable for injury resulting to the building by fire which is due to the more dangerous nature of the cotton. *Anderson* v. *Miller* (Tenn.) 604

2. A tenant has a right to manure produced on the leased premises by stock in excess of that maintainable by the products of the premises, from fodder produced elsewhere. *Pickering* v. *Moore* (N. H.) 698

NOTES AND BRIEFS.

See also MINES.

Landlord and tenant; rights of landlord and tenant in respect to manure on leased premises; English cases; American authorities; exceptions to the rule. 698

LEVY AND SEIZURE. See also ATTACHMENT, 3.

1. Depot grounds are subject to execution sale under a constitutional provision that "real and personal property" of a railroad corporation, or "any part thereof, shall be liable to ex-

ecution and sale in the same manner as the property of individuals." *Texas Mexican R. Co.* v. *Wright* (Tex.) 200

2. A constable is not precluded from levying on the real estate of a railroad corporation by the fact that a car is pointed out as subject to levy, if the car is not delivered into his possession as required by Tex. Rev. Stat. art. 2287. *Id.*

LIBEL. See also BANKS, 1.

NOTES AND BRIEFS.

By defamatory picture or statue. 288

LICENSE. See also COMMERCE, 3, 4; CONSTITUTIONAL LAW, 8.

1. An ordinance providing that persons who "temporarily reside in" a municipality must obtain a license before they can sell goods in a certain manner is invalid by reason of its discrimination against nonresidents. *Carrollton* v. *Bazzette* (Ill.) 522

2. An ordinance requiring itinerant merchants to pay a license fee is not limited to peddlers, but applies to a merchant who takes his stock of goods from city to city doing business for a few weeks only in each place. *Id.*

3. A license fee of $10 for each day's business carried on by an itinerant merchant, without any discrimination on account of the extent of business or the length of time it may be carried on, is invalid because unnecessarily burdensome and in general restraint of trade and prohibitory of the business. *Id.*

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

License; discrimination as to nonresidents. 379

Amount of fee; when excessive. 523

LIFE TENANTS. See also ADVERSE POSSESSION; MINES, NOTES AND BRIEFS.

1. A reservation of a life use of land conveyed includes the right to a royalty on an oil and gas lease as an incident of the life estate, notwithstanding an express exception that the grantee takes subject to any lease for oil or gas or any sale of royalty for oil or gas made by the grantor, while he had previously sold a portion of his royalty. *Koen* v. *Bartlett* (W. Va.) 128

2. A life tenant is entitled to the profits of mines of oil or gas which are open when his life estate begins, or are lawfully opened and worked during the existence of his estate, unless he is restrained by covenant or agreement. *Id.*

LIGHTNING. See ELECTRICAL USES, NOTES AND BRIEFS.

LIMITATION OF ACTIONS. See also ADVERSE POSSESSION; CONSTITUTIONAL LAW, 12, 13, 15.

1. The defense of laches does not generally apply where the situation of the parties has not been altered, and one has not been put in a worse condition by the delay of the other. *Parker* v. *Bethel Hotel Co.* (Tenn.) 706

2. Litigation as to the right to offices in an association will not suspend the running of the statute against an action by one rival body against the other to establish the exclusive use to a name. *Grand Lodge A. O. U. W.* v. *Graham* (Iowa) 133

3. Delay in procuring a certificate of the right to a corporate name will not enlarge the time for bringing an action to establish an exclusive right to it, which accrued at the time of incorporation, when the certificate was not required. *Id.*

4. An amendment adding the words "of Baltimore city" to the name of the defendant, sued as the "Western Union Telegraph Company," and which was the party intended to be sued, although the person served was general manager in the state of a foreign corporation bearing that name as well as president and manager of the Baltimore company, does not add a new party or operate as the equivalent of bringing a new suit, with respect to a plea of the statute of limitations. *Western U. Teleg. Co.* v. *State, Nelson* (Md.) 572

LOTTERY.

1. An agreement by one person to take all the chances on a proposed scheme to raffle off property, thereby eliminating all the elements of chance and fixing a definite price for the property, is not unlawful. *Thornhill* v. *O'Rear* (Ala.) 792

2. A sale of lots to be drawn by the purchasers, and the advantages of location, character, size, or condition as between lots of the same class to be determined wholly by lot, while one prize lot is to be given to some one of the purchasers as the result of chance, is contrary to public policy and void. *Lynch* v. *Rosenthal* (Ind.) 835

NOTES AND BRIEFS.

Lottery; invalidity of lottery contract. 835

MANDAMUS.

1. Mandamus will lie to compel the delivery of the insignia of an office to one having a certificate of election thereto, and who has qualified thereunder, irrespective of his eligibility. *Stevens* v. *Carter* (Or.) 342

2. The courts in mandamus proceedings will compel delivery of the insignia and property of a public office for the time being, to one having a prima facie title to such office, without adjudicating the actual title. *State, Lamar,* v. *Johnson* (Fla.) 357

3. Mandamus to put into possession of the property and insignia of a public office one having the certificate of election and the commission to hold the office cannot be defeated by a claim that the election was illegal, and that the prior incumbent is entitled to hold as an officer *de facto* until proper election and qualification of his successor. *Id.*

4. To defeat a mandamus proceeding to compel the incumbent of an office whose term has expired to turn over the insignia of the office to an alleged successor, it must appear that he

has a colorable title to the office and is in possession of it and discharging the duties thereof under a claim of right. *Stevens* v. *Carter* (Or.) 342

5. An alternative writ of mandamus to compel the surrender by a prior incumbent of a public office, of the office room and documents, need not allege the eligibility of the person elected. *State, Lamar,* v. *Johnson* (Fla.) 357

6. An alternative writ of mandamus to compel the surrender by a prior incumbent of a public office, of the office room and documents, need not allege in specific words that his term has expired or that a successor has been elected, but it is sufficient if such election and expiration follow as a necessary consequence from the words used. *Id.*

NOTES AND BRIEFS.

Mandamus; to compel surrender of office:—(I.) General doctrine governing; (II.) necessity of a demand and refusal; (III.) effect of such surrender; (IV.) sufficiency of title to support; (V.) special provisions relating to; (VI.) in the case of a private corporation; (VII.) when writ refused: (*a*) insufficiency of facts; (*b*) in case of a private party; (*c*) when there is another remedy; (*d*) in the absence of ouster; (*e*) prima facie title; (*f*) possession by an officer *de facto;* (*g*) when the title is in issue; (*h*) question of election; (*i*) other relief sought; (*j*) relator's own act; (VIII.) English cases. 342

MANURE. See ACCESSION; COTENANCY; LANDLORD AND TENANT, 2, NOTES AND BRIEFS.

MARRIAGE. See HUSBAND AND WIFE.

MASTER AND SERVANT. See also CARRIERS, 10; CHARITIES, 1.

1. An express order for an unlawful arrest by an agent of a railroad company is not necessary to render the company liable if the arrest was procured by the agent acting within the scope of his employment. *Eichengreen* v. *Louisville & N. R. Co.* (Tenn.) 702

2. False imprisonment of an innocent person on a charge of attempting to pass counterfeit money, which is procured by a railroad detective while acting within the scope of his authority, renders the railroad company liable, although in this particular matter he exceeded his authority and acted contrary to his instructions respecting the caution to be exercised. *Id.*

3. A civil engineer whose duties are to look after the building and maintenance of railroad bridges and trestles assumes the risk of injury from the failure of the company to provide a watchman at a bridge which gives way under the train upon which he is traveling in discharge of his duties, as he must be presumed to know that no watch is kept upon such bridge. *Texas & P. R. Co.* v. *Smith* (C. C. App. 5th C.) 321

4. A railroad official particularly charged with the care and maintenance of the bridges upon the line of the railroad is at fault for failure to maintain a sufficient watch upon a bridge, which will prevent recovery for his death from the fall of such bridge under the train upon which he is traveling in the discharge of his duties. *Id.*

NOTES AND BRIEFS.

See also CARRIERS; CHARITIES; EXPRESS COMPANY.

Master and servant; liability for wrongful acts of servant. 702

MAXIMS.

1. A man must use his own so as not to injure another. *Gilfillan* v. *Schmidt* (Minn.) 547

2. No one shall be both judge and witness in the same cause. *Rogers* v. *State* (Ark.) 465

3. Res ipsa loquitur. *Western U. Teleg. Co.* v. *State, Nelson* (Md.) 572

4. Stare decisis. *Denny* v. *State, Busler* (Ind.) 726

MAYOR. See PARLIAMENTARY LAW.

MEMORIAL. See INJUNCTION, 8, 9.

MINES. See also LIFE TENANTS.

1. An agreement to furnish pipes, fixtures, and plumbing for supplying the lessor's house, included in a lease for oil and gas purposes, and to leave the pipes and fixtures if the well ceases to be a paying one, must be construed to apply only if gas is obtained by the lessee. *Evans* v. *Consumers' Gas Trust Co.* (Ind.) 673

2. A provision in an oil and gas lease, that it shall be null and void on failure of the lessee to perform his agreement, is no defense to him for breach of his agreement, but merely gives the lessor an option to declare it void for that reason. *Id.*

NOTES AND BRIEFS.

Mines; right of life tenant as to oil and gas. 128

Forfeiture of oil and gas lease; manner of enforcing forfeiture clause; waiver; estoppel; how forfeiture clause regarded; absence of obligation clause; effect of alternative provision for rent; who may set up forfeiture. 673

MORTGAGE. See also CONTRACTS, 18, 19, NOTES AND BRIEFS.

NOTES AND BRIEFS.

Mortgage; necessity of registry. 405

MOTION. See JUDGMENT, 3

MUNICIPAL CORPORATIONS. See also CONSTITUTIONAL LAW, 13; COSTS, 2; HIGHWAYS, 1; LICENSE; PARLIAMENTARY LAW; QUO WARRANTO; STATUTES, 4, 5; WATERS, 3.

1. The equitable claim of a city to jurisdiction over territory which a void statute has declared to be annexed to it will not be disturbed at the instance of the state, without any suggestion of anticipated benefits by so doing, where for more than four years the city has exercised authority over such territory to the exclusion of prior incorporations which the void statute purported to abolish. *State, West,* v. *Des Moines* (Iowa) 186

2. A city may contract for the disposal of sewage from the outfall of sewers, although this is outside the corporate limits. *McBean* v. *Fresno* (Cal.) 794

3. A contract by a municipal board, extending for more than one year or beyond the term of office of the board which makes it, if it is fair, just, and reasonable, prompted by the necessities of the situation, or in its nature advantageous to the municipality, is not invalid as a surrender or suspension of the legislative power of the municipal authorities. *Id.*

4. Subsequent appropriations for instalments coming due on a contract made by city authorities in violation of statute prohibiting contracts for which appropriations had not already been made cannot operate as a ratification of the contract so as to make it binding. *Indianapolis* v. *Wann* (Ind.) 743

5. The liability incurred by a city contract to pay an annual sum during a period of years for the disposal of sewage is, within the meaning of a constitutional provision that any liability "exceeding in any year the income and revenue provided for it for such year" shall be void, to be deemed the amount annually payable, and not the aggregate for the whole time of the contract. *McBean* v. *Fresno* (Cal.) 794

6. A contract for street lights for five years at a certain price per light per year, payable monthly, made by the executive department of public works, when no appropriation for the purpose had been made except for a month or two in advance, is void, where the statute provides that no executive department shall bind the city by a contract, agreement, or in any way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose, and that all contracts and agreements, expressed or implied, and all obligations of any and every sort, beyond such existing appropriations, are absolutely void. *Indianapolis* v. *Wenn* (Ind.) 743

7. No vote is required to render a town subject to the obligations of the Massachusetts act of 1891, chap. 370, as to the purchase of property for the establishment of a light plant, in addition to the two votes provided by § 3 of the act, that it is expedient for the town to exercise the authority conferred by the act. *Citizens' Gaslight Co.* v. *Wakefield* (Mass.) 457

8. A petition to compel a town which has elected to establish a light plant to purchase a plant already in operation, as required by Mass. act 1891, chap. 370, is not wholly defeated by the fact that the poles carrying the light wires in the highways were not legally located. *Id.*

9. The schedule of property which the owner of a light plant wishes to sell to a town which has elected to establish one under the Massachusetts act of 1891, chap. 370, need not be sufficiently particular to sustain a decree for specific performance, or such as would be required in a formal conveyance of property. It is sufficient if it would enable the commissioners to identify the property and intelligently make an adjudication as to what shall be sold and purchased. *Id.*

10. Ratification by a gas and electric-light corporation of the action of its board of directors in electing in due time to sell its property to a town which has decided to establish a light plant, under the Massachusetts act of 1891, chap. 370, before the town has changed its position, will make the act binding, although it was not within the thirty days given the corporation in which to act. *Id.*

11. A town which elects to avail itself of the provisions of a statute enabling it to establish a light plant cannot attack the act as unconstitutional because it gives the owner of an existing plant the option to compel it to purchase that, and makes no provision for a jury trial as to value. *Id.*

12. A specification of the items in detail which make up a general fund for which a city tax levy is made is not necessary under a charter which requires the statement to specify only the amount required, and directs the levy of such sums as may be sufficient for lawful purposes. *Hayes* v. *Douglas County* (Wis.) 213

13. Estimates by the board of public works and the comptroller, required by the charter of the city of Superior under Wis. Laws 1891, chap. 124, do not limit the power of the common council in fixing the amount for which a tax levy may be ordered, as they are required to "levy such sums of money as may be sufficient." *Id.*

NOTES AND BRIEFS.

Municipal corporations; liability for negligence as to electric wires. 581

Validity of annexation; contest of annexation. 187

Compelling purchase of light plant by. 458

Ultra vires contract of. 743

Validity of contract of; amount of indebtedness. 795

NAME. See CORPORATIONS, 5–7; PARTNERSHIP, NOTES AND BRIEFS.

NATURALIZATION.

NOTES AND BRIEFS.

Effect of, on inheritance. 181

NEGLIGENCE. See also CASE; RAILROADS, 4; TRIAL, 4, 5, 14–16.

1. Negligence of a parent cannot be imputed to a child in an action brought for the benefit of the child, injured by the negligence of another. *Roth* v. *Union Depot Co.* (Wash.) 855

2. The doctrine of comparative negligence is no longer the law in Illinois. *Cicero & P. R. Co.* v. *Meixner* (Ill.) 331

3. The concurring negligence of two parties makes both liable to a third party injured thereby, if the injury would not have occurred from the negligence of one of them only. *City Electric Street R. Co.* v. *Conery* (Ark.) 570

NOTES AND BRIEFS.

See also ELECTRICAL USES; GAS.

Negligence; in sale of dangerous article. 220

NEW TRIAL.

1. A new trial will not be granted where it is apparent that the result of another would probably be the same. *Leyson* v. *Davis* (Mont.) 429

2. A new trial on the ground of newly discovered evidence is not warranted in an action for injuries caused by a defective electric wire, by the fact that the record at police headquarters does not show that notice of the defect was sent in as stated by a patrolman who testified that he reported the defect before the accident happened. *Denver Consol. Elec. Co.* v. *Simpson* (Colo.) 566

NOTICE. See GUARDIAN AND WARD.

NUISANCES.

1. Special or peculiar damages differing, not merely in degree, but in kind, from those which are deemed common to all, must be suffered in order to give a private party a right of action to abate a public nuisance. *Mahler* v. *Brumder* (Wis.) 695

2. A private party cannot maintain an action to enjoin the obstruction of a public road or street which is a *cul de sac*, by a fence between his property and the end of the road, merely because he purchased his premises with reference to a plat which indicated the existence of such road. *Id.*

NOTES AND BRIEFS.

Nuisance; prevention of. 109

OFFICERS. See also BONDS, 2, 3; CIVIL SERVICE; MANDAMUS.

1. The incumbent of an office cannot, because of the ineligibility of his successor, hold over after his official term has expired and his successor has been elected and qualified, unless such ineligibility has been established in the manner prescribed by law. *Stevens* v. *Carter* (Or.) 342

2. The official acts of public officers in an office created by an unconstitutional statute, performed before it has been declared unconstitutional by an authoritative decision by the courts of the state, cannot be collaterally attacked. *State* v. *Gardner* (Ohio) 660

3. The liability of a county trustee who gives a bond faithfully to perform the duties of his office and collect and pay over school taxes is fixed, not merely by the terms of his bond, but by the laws relating to his office. *State, Overton County,* v. *Copeland* (Tenn.) 844

4. An officer is not to be considered as a debtor for public funds in his hands which he has no right to use in any way except for the purposes of his trust; and he holds them, not strictly as a special bailee, but as a trustee clothed with legal duties and liabilities. *Id.*

5. A deposit of public funds in a bank of undoubted standing and reputation is not negligence or want of proper business prudence and caution on the part of an officer. *Id.*

NOTES AND BRIEFS.

See also BONDS; MANDAMUS.

Officers; *de facto* under unconstitutional statute. 660

OIL. See LIFE TENANTS; MINES, NOTES AND BRIEFS.

OPTION. See CONTRACTS, 8.

PARENT AND CHILD. See also CONTRACTS, 4.

The duty of the children of poor persons to maintain them to the extent of their ability, under Dak. Comp. Laws, § 2612, although no mode of procedure for enforcing it is prescribed, makes such children liable to the county when it has furnished necessary support to an indigent and helpless parent. *McCook County* v. *Kammoss* (S. D.) 461

NOTES AND BRIEFS.

Parent and child; oral contract for adoption. 810

PARLIAMENTARY LAW.

1. A mayor can vote only to break a tie, and not to make one, in the election of a city officer "by joint convention of the city council," under a charter which provides "that the mayor shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote," although another provision declares that "the mayor, board of aldermen, and common council shall constitute the city council." *Brown* v. *Foster* (Me.) 116

PARTNERSHIP.

Insolvent members of an insolvent firm cannot use the partnership property to pay their individual debts, leaving the partnership debts unpaid. *Jackson Bank* v. *Durfey* (Miss.) 470

NOTES AND BRIEFS.

Partnership; criminal liability for receiving deposit in insolvent bank. 125

Right to use of name on dissolution. 657

PEDDLERS. See also COMMERCE, 3, 4.

NOTES AND BRIEFS.

Invalidity of license tax on. 379

PHOTOGRAPHS. See also INJUNCTION, 7; PRIVACY, 2.

For a photographer to make additional copies from a negative of a picture from which a customer has procured a certain number of copies to be made is breach of contract as well as a violation of confidence. *Corliss* v. *E. W. Walker Co.* (C. C. D. Mass.) 283

PICTURE. See INJUNCTION, 7; PRIVACY, 2, 3.

PLEADING. See also APPEAL AND ERROR, 1; LIMITATION OF ACTIONS, 4.

1. Under the reformed procedure a court having both law and equity jurisdiction cannot dismiss a bill to enjoin the enforcement of a judgment merely because the facts stated do

not entitle complainant to such relief, if it can be so amended as to entitle him to some relief. *Michener* v. *Springfield Engine & T. Co.* (Ind.) 59

2. A defendant who is brought into a suit by cross-bill may himself file a cross-bill where it is necessary to do complete justice and terminate the litigation, under a statute providing that any defendant may, after filing his answer, exhibit and file his cross-bill. *Blair* v. *Illinois Steel Co.* (Ill.) 269

POOL SELLING. See STATUTES, 6.

POOR AND POOR LAWS. See PARENT AND CHILD.

NOTES AND BRIEFS.

Compelling relatives to support or reimburse town for support. 462

POST MORTEM. See CORONER, NOTES AND BRIEFS; CORPSE; EVIDENCE, 18.

PRINCIPAL AND SURETY. See also ATTACHMENT, 3; INJUNCTION, 22; JUDGMENT, 5.

A surety will be discharged, even after judgment against him, by the discharge of the principal because of matters inherent in the transaction. *Michener* v. *Springfield Engine & T. Co.* (Ind.) 59

NOTES AND BRIEFS.

Principal and surety; enjoining judgment against or in favor of sureties. 59

PRIVACY. See also INJUNCTION, 6, 7.

1. The publication of the life of an inventor, whether he is regarded as a public or a private character, cannot be enjoined as an invasion of the right of privacy, since the freedom of the press is a constitutional right. *Corliss* v. *E. W. Walker Co.* (C. C. D. Mass.) 283

2. The picture or photograph of a public person—such as a great inventor—may lawfully be published in a newspaper, magazine, or book, if a copy can be obtained without breach of contract or violation of confidence. *Id.*

3. A woman's right of privacy, in so far as it includes the right to prevent the public from making pictures, busts, or statues of her to commemorate her worth or services, does not survive her so that it can be enforced by her relatives. *Schuyler* v. *Curtis* (N. Y.) 286

NOTES AND BRIEFS.

Privacy; law of. 283

Injunction to protect. 288

PRIVATE ACTION. See ACTION OR SUIT, 1; INJUNCTION, 14; NUISANCES.

PROCESS. See WRIT AND PROCESS.

PROXIMATE CAUSE.

1. Negligence is the proximate cause of an accident only when under all the circumstances the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough that the accident is the natural consequence of the negligence. *Huber* v. *La Crosse City R. Co.* (Wis.) 583

2. The proximate cause of damages to a building by fire when cotton is stored therein without right is the storage of the cotton therein, if except for that the fire could have been extinguished with little or no damage. *Anderson* v. *Miller* (Tenn.) 604

PUBLICATION. See PRIVACY, 1.

PUBLIC IMPROVEMENTS. See also CONSTITUTIONAL LAW, 14, 15.

1. An assessment upon abutting property for street improvements, levied according to benefits, is not a violation of Va. Const. art. 10, § 1, requiring taxation to be equal and uniform upon all property according to value. *Violett* v. *Alexandria* (Va.) 382

2. An ordinance for a local assessment by the front foot is not authorized by a statute providing for assessments according to benefits. *Id.*

3. An assessment for a street improvement, levied only upon property fronting thereon and made by the frontage rule, is invalid when the law requires it to be made according to benefits. *Hayes* v. *Douglas County* (Wis.) 213

4. Assessments upon property according to the frontage of each lot, made without actual view of the property or considering the actual benefits accruing to each parcel, are invalid where the law requires the lots to be assessed "in proportion to the benefits secured thereto," even if the property abutting or fronting on the improvement is made an assessment district. *Id.*

5. The failure of an assessment made by the frontage rule to show upon its face that it was made according to the benefits accruing to each parcel, when the statute requires such benefits to be taken as the measure of the assessment renders it void. *Id.*

6. An appeal from an assessment, which permits a review only of the amount assessed, is not such a remedy as will preclude a suit to set aside the assessment when it is unequal and void. *Id.*

7. Payment by a property owner of his proportion of an assessment is not a condition precedent to relief against the assessment, when that is made in entire disregard of the statute so that it is presumed to be unequal. *Id.*

NOTES AND BRIEFS.

Public improvements; validity of assessments. 215

Validity of assessments for; uniformity; theory as to benefits. 382

PUBLIC MONEY.

NOTES AND BRIEFS.

Action by taxpayer to prevent misuse of. 475

QUO WARRANTO.

Leave to a taxpayer to prosecute an action of quo warranto to contest annexation to a

city, given under Iowa Code, § 3348, is conclusive against an attack made in the quo warranto proceedings on the ground that his interest was trivial. *State, West,* v. *Des Moines* (Iowa) 186

RAFFLE. See LOTTERY.

RAILROADS. See also EMINENT DOMAIN, 1–3, 5–9; EVIDENCE, 9; LEVY AND SEIZURE.

1. A railroad seeking to cross another should be permitted to employ, and required to pay, the necessary watchman at such crossing. *Butte, A. & P. R. Co.* v. *Montana U. R. Co.* (Mont.) 298

2. The liability of a railroad company for failure to keep a sidewalk across its track in fit and safe condition, as required by law, is not affected by the fact that a right of action might possibly exist for the same defect against a municipality. *Jeffrey* v. *Detroit, L. & N. R. Co.* (Mich.) 170

3. A man injured while driving a span of horses with a snow plow across a railroad track in cleaning a sidewalk is not precluded by his unusual use of the walk from maintaining an action against the railroad company for a defect in the walk caused by missing planks, if the accident was due to failure to keep the crossing in a reasonably safe and suitable condition for ordinary use. *Id.*

4. A child should not be held to the same degree of care in avoiding danger while walking on a railroad track as a person of mature years and accumulated experience. *Roth* v. *Union Depot Co.* (Wash.) 855

5. Kicking cars out of sight around a curve on a down grade, without any person on them, in a thickly settled community, where it is the custom to use the track as a footpath without objection from the railroad company, and it is known that from fifty to one hundred people a day walk upon the track, and the cars are not usually sent this way, is such gross and wilful negligence that the railroad company will be liable for a child killed by a car thus kicked, —especially where two of them were kicked on parallel tracks at the same time,—although the child had no right to use the track. *Id.*

NOTES AND BRIEFS.

Railroads; duty as to sidewalk at crossing. 170
Right to open highway across. 183
Duty as to licensees on track. 855

RATIFICATION. See MUNICIPAL CORPORATIONS, 4.

RECEIPT. See also ACCORD AND SATISFACTION.

NOTES AND BRIEFS.

Conclusiveness of. 171

RECEIVERS. See also CONFLICT OF LAWS, 3; CORPORATIONS, 38; COURTS, 6.

1. A loan by a bank to an embarrassed telegraph company which is in pressing need of money to meet its current expenses, and which uses the money in paying debts of a character for which receivers' certificates were authorized to be issued, will not give the bank a lien on the assets superior to a first mortgage on the property, if neither the bank nor the persons who were paid out of the loan obtained receivers' certificates. *Farmers' Loan & T. Co.* v. *Bankers' & N. Teleg. Co.* (N. Y.) 403

2. A claim for rent for property leased to a corporation which has been placed in the hands of a receiver, in a suit in which the lessor joins, which accrues subsequently to his appointment, cannot be made a preferred claim against the funds in his hands, unless he in fact adopts the lease. *Tradesman Pub. Co.* v. *Knoxville Car Wheel Co.* (Tenn.) 593

NOTES AND BRIEFS.

See also COURTS.

Receivers; effect of order appointing; attachment of assets. 405

REFERENCE. See EMINENT DOMAIN, 10.

RELIGIOUS SOCIETIES.

The majority of the members of a Free Will Baptist society cannot against the will of the minority transfer property obtained for the use and benefit of that denomination, which holds the doctrines of Arminius, to the Baptist denomination, which is Calvinistic, notwithstanding a provision in the manual of church government of the Free Baptist denomination to the effect that a church in good standing may have a letter of dismission and recommendation to another evangelical denomination, as this appears to refer to the church as an ecclesiastical, rather than as a purely legal, body. *Park* v. *Champlin* (Iowa) 141

NOTES AND BRIEFS.

Religious societies; rights of factions as to property. 141

REMAINDER. See ADVERSE POSSESSION; WILLS, 5.

REMEDY. See CONSTITUTIONAL LAW, 10.

REPLEVIN. See ACTION OR SUIT, 4.

RESUME.

For résumé of contents of book, see 865

REVIEW. See JUDGMENT, 5.

SAVINGS BANKS. See BANKS, 4; WILLS, 2.

SCHOOLS. See BONDS, 1; CONSTITUTIONAL LAW, 13; TAXES, 2–4, NOTES AND BRIEFS.

SEARCH AND SEIZURE.

The constitutional protection against unreasonable seizures is violated by entering a private inclosure and taking away from the possession of the owner under order of court a wrecked boiler, engine, and other materials for use as exhibits on a prosecution of another

person for criminal negligence in causing the explosion of the boiler. *Newberry* v. *Carpenter* (Mich.) 163

SEAT OF GOVERNMENT. See CAPITAL, NOTES AND BRIEFS; CONSTITUTIONAL LAW, 3–5; CONTRACTS, 1.

SEDUCTION.

A betrothed person has no right of action for the seduction or alienation of the affections of his affianced. *Case* v. *Smith* (Mich.) 282

SEIZURE. See SEARCH AND SEIZURE.

SERVICE. See WRIT AND PROCESS.

SET-OFF AND COUNTERCLAIM. See also PLEADING, 2.

NOTES AND BRIEFS.

As ground of injunction against judgment when it existed before its rendition. 747

SHIPPING. See ADMIRALTY.

SPECIFIC PERFORMANCE.

A contract to give a minority stockholder the right to control the stock of another and vote it at a stockholders' meeting, for the sole purpose of securing control of the corporation by the use of such stock, will not be specifically enforced in equity. *Gage* v. *Fisher* (N. D.) 557

STATE. See ACTION OR SUIT, 1; ATTORNEY GENERAL; COURTS, 2; INJUNCTION, 13.

STATE CAPITAL. See CAPITAL; CONSTITUTIONAL LAW, 3–5; CONTRACTS, 1.

STATUTE. See APPEAL AND ERROR, 13; INJUNCTION, 10–12; PRIVACY, 3.

STATUTE OF FRAUDS. See CONTRACTS, 3-6.

STATUTES. See also COMMON LAW, 1.

1. The construction placed upon a statute penal in character by public officers charged with the duty of executing its provisions for many years may properly be considered in determining the legislative intention. *People* v. *Adelphi Club* (N. Y.) 510

2. A practical interpretation of a statute, accepted as correct for nearly three quarters of a century, is entitled to respectful consideration by the courts. *Brown* v. *Foster* (Me.) 116

3. The re-enactment of the New York civil service law after the adoption of the Constitution of 1894 is not necessary in order to make it applicable to the department of public works, to which it could not apply under the Constitution in force when the act was passed, as the new Constitution not only adopts the principle of the law, but declares "such acts of the legislature . . . as are now in force shall be and continue the law of this state subject to such alterations as the legislature shall make." *People, McClelland,* v. *Roberts* (N. Y.) 399

4. A statute for the annexation of territory to all cities having more than a specified population is within a constitutional provision against local legislation, when there is but one city in the state to which it can apply. *State, West,* v. *Des Moines* (Iowa) 186

5. An act providing for annexation to a city is one for the incorporation of a city within the meaning of a constitutional provision against local or special laws for this purpose. *Id.*

6. Pool selling is the only form of betting or wager that is punishable by a statute which prohibits bets and wagers of all kinds, but the title of which is "An Act to Prevent Pool Selling, etc." *Ex parte Lacy* (Va.) 822

7. The words "and so forth" in the title of a statute cannot supply an omission when the title is less comprehensive than the body of the statute. *Id.*

NOTES AND BRIEFS.

Statutes; sufficiency of title; embracing more than one object. 823

STIPULATION. See COURTS, 4.

STOCK. See CORPORATIONS; GIFT, 2–4; SPECIFIC PERFORMANCE.

STOLEN PROPERTY. See CORPORATIONS, 16.

STREET RAILWAYS. See also CARRIERS, 11; ELECTRICAL USES AND APPLIANCES, 5-7, 9.

NOTES AND BRIEFS.

Liability for negligence as to dangerous electric currents on wires, see ELECTRICAL USES.

SUBROGATION.

NOTES AND BRIEFS.

See also INSURANCE.

To party who has paid debts. 405

SUMMARY PROCEEDINGS. See also TRIAL, 1.

NOTES AND BRIEFS.

Injunction as to judgment by or against surety in. 63

SUNDAY. See also CONSTITUTIONAL LAW, 6, 22.

The fact that forfeits were deposited on Sunday to bind the parties to an agreement which was invalid because made on that day does not give one of them any right to recover his deposit after the holder has executed the transaction on a subsequent day by delivering the forfeit to the other party before he was notified not to do so. *Thornhill* v. *O'Rear* (Ala.) 792

NOTES AND BRIEFS.

Sunday; validity of Sunday law; class legislation. 689

TAXES. See also CONTRACTS, 14; MUNICIPAL CORPORATIONS, 12, 13; COUNTIES; INJUNCTION, 17.

1. The requirement of Ky. Stat. § 4228, that every foreign building and loan association doing business within the state shall pay into the treasury annually 2 per cent of its annual gross receipts, does not violate Ky. Const. § 174, requiring all nonexempt property, whether owned by natural persons or corporations, to be uniformly taxed in proportion to its value, but providing that nothing shall

prevent a taxation based on "franchises." *Southern Bldg. & L. Asso.* v. *Norman* (Ky.) 41

2. A school district cannot, if it can recover at all, recover from another district which has collected taxes upon lands within the former, through a mistake of the clerk as to the location of the lands, a greater sum than it would have collected had there been no mistake. *Walser* v. *Board of Education* (Ill.) 329

3. A school district cannot recover from another district which has collected taxes upon lands within the former, through a mistake of the clerk as to the location of the lands, any of the taxes so collected, although the rate per cent of the tax as extended in the former was thereby made greater than it otherwise would have been, where the full amount of the levy made by its board of education was collected, as the district does not become a trustee for one taxpayer of an excessive amount collected from another. *Id.*

4. Taxpayers in one school district who voluntarily pay a tax for another district levied by mistake upon their lands cannot recover back the amount paid, where the books were kept open for inspection by them, and the means of knowledge existed to learn and know all the facts, although they supposed that they were paying the tax of the district in which their lands were situated. *Id.*

NOTES AND BRIEFS.

Taxes; for what purpose authorized. 215

Right to recover on payment to wrong school district. 329

TELEGRAPHS. See ELECTRICAL USES, NOTES AND BRIEFS; RECEIVERS.

TELEPHONES. See also ELECTRICAL USES, 7.

NOTES AND BRIEFS.

Liability for negligence as to dangerous electric currents on wires, see ELECTRICAL USES.

TERRITORIAL COURTS. See APPEAL AND ERROR, 2.

TRADEMARK.

1. Prior use of a name by other persons is sufficient to defeat a trademark, although it was not a commercial use and was only for a short period, if it was such that the name had already become extensively recognized and well known before it was claimed as a trademark. *Hoyt* v. *J. T. Lovett Co.* (C. C. App. 3d C.) 44

2. The words "Green Mountain" cannot be appropriated by an individual as a trademark for grape vines and grapes which are the natural product of the Green Mountains, to the exclusion of others who deal in similar articles originating in the same locality. *Id.*

3. An organic article which by the law of its nature is reproductive, and derives its chief value from its innate vital powers independently of the care, management, or ingenuity of man,—such as seeds, plants, or vines,—cannot be the subject of a trademark so as to prevent the use of the name of the parent stock by any person cultivating and selling its products. *Id.*

4. The words "fireproof oil" cannot be claimed as a trademark for an illuminating oil, since the words are descriptive of oil which is not inflammable although it is not literally proof against fire. *Scott* v. *Standard Oil Co.* (Ala.) 374

NOTES AND BRIEFS.

Trademark; validity of. 374

TRADENAME. See also CORPORATIONS, 7.

A purchaser of the assets and goodwill of a trading partnership upon a sale either by the partners directly or through a receiver or a corporation organized by him to carry on the business, and to which he transfers the property, is entitled to make use of the firm name for the purpose of continuing the business as its successor. *Snyder Mfg. Co.* v. *Snyder* (Ohio) 657

TREES. See TRESPASS.

TRESPASS. See also ANIMALS, 1.

The unreasonable cutting or trimming of trees on a sidewalk by employees who have authority to cut or trim trees so far as is necessary in removing telephone wires which they have been lawfully ordered to remove will not sustain an action of trespass by the abutting lot owners against the employer. *Southern Bell Teleph. & Teleg. Co.* v. *Francis* (Ala.) 193

TRIAL. See also EVIDENCE, NOTES AND BRIEFS.

1. A summary proceeding for a restraining order against carrying on a business declared by the legislature to be a common nuisance is not a case within the scope of the constitutional guaranty of the right of trial by jury. *Ex parte Keeler* (S. C.) 678

2. A person who has a fixed opinion as to the guilt or innocence of a person charged as principal in a crime is not a competent juror upon the trial of one charged as accessory. *State* v. *Gleim* (Mont.) 294

Questions for jury.

3. The extent of the intoxication of a passenger, the conductor's knowledge of his condition, and the safety of the place at which he was ejected, are questions for the jury. *Louisville & N. R. Co.* v. *Johnson* (Ala.) 372

4. The exercise of due care or caution in boarding an electric street car while in motion is a question for the jury. *Cicero & P. R. Co* v. *Meixner* (Ill.) 331

5. Carrying a lighted coal-oil lamp into a cellar, with knowledge that a large amount of illuminating gas has escaped therein, and the lighting of matches therein, do not, as a matter of law, preclude recovery for injuries from explosion of such gas, where it is not certain that the explosion was the result thereof, but the lapse of time and other circumstances admit of a finding that it might have been due to other causes, and the question is for the jury. *Consolidated Gas Co.* v. *Crocker* (Md.) 785

6. The liability of cattle to communicate a disease cannot be assumed as matter of law, on

account of the fact that they came from a particular locality. *Clarendon Land I. & A. Co.* v. *McClelland* (Tex.) 669

Instructions.

7. An instruction, the substance of which is contained in an instruction given, is properly refused. *Mitchell* v. *Charleston Light & P. Co.* (S. C.) 577

8. The trial judge is not required to strike out from a request to charge a part which renders it defective, and charge the remainder. *Id.*

9. A general request to put an instruction in writing does not cover a remark of the court in response to a remark of counsel in his argument. *Rogers* v. *State* (Ark.) 465

10. The court cannot instruct the jury as to what weight should be given to testimony, even if it relates to admissions of the accused. *State* v. *Gleim* (Mont.) 294

11. An instruction in a criminal case depending upon circumstantial evidence, that the jury must not be "satisfied beyond a reasonable doubt of each link in the chain of circumstances" relied upon to establish guilt, but that it is sufficient if they are "satisfied beyond a reasonable doubt that defendant is guilty,"—is erroneous. *Id.*

12. A statement by the court that great "bodily injury" is a "felony committed on the person" is erroneous. The question must to a great extent be left to the judgment of the jury. *Rogers* v. *State* (Ark.) 465

13. An instruction requested by a carrier, comparing the injuries received by a passenger on a baggage car and those to which a passenger would have been liable in a regular passenger coach, is properly refused. *Baltimore & P. R. Co.* v. *Swann* (Md.) 313

14. An instruction that no blame would attach to defendant from the falling of a wire charged with electricity and its remaining on the ground in a public thoroughfare, unless it was allowed for an unreasonable time to remain there "after notice," is properly refused. *Mitchell* v. *Charleston Light & P. Co.* (S. C.) 577

15. An instruction that if a "cyclone that could not be anticipated or reasonably foreseen" was the cause of the fall of a wire charged with electricity, and defendant company was not negligent in allowing it to remain for an unreasonable time, it would not be liable,—is not misleading where the judge also instructs that, if the accident was due to the wires being improperly erected or maintained or to their being allowed to remain on the streets an unusually long time, the company would be liable. *Id.*

16. An instruction that a company maintaining an electric wire carrying a dangerous current, over a public street or alley, is not an insurer of the safety of passersby, but in constructing its line and maintaining the same is bound to the utmost degree of care and diligence,—that is to the highest degree of care, skill, and diligence,—so as to make the same safe against accidents so far as such safety can by the use of such care and diligence be secured,—is not erroneous, although it is better to instruct the jury that the company is bound to exercise that reasonable care and caution which would be exercised by a reasonably cautious and prudent person under the same circumstances. *Denver Consol. Elec. Co.* v. *Simpson* (Colo.) 566

Submission of questions.

17. There is no abuse of discretion in refusing to set aside a submission which is claimed to have been made under the mistaken belief that no answer had been filed, where, although the answer was not filed on the day it was due, it had been on file for several months, which fact by the exercise of ordinary diligence could have been discovered by counsel before entering the order of submission. *Payton* v. *McQuown* (Ky.) 33

18. Giving or withholding from the jury questions for special findings of fact is within the discretion of the trial court, under Colo. Code 1887, § 199, providing that in any case in which the jury render a general verdict they may be required by the court to find specially upon any particular questions of facts, to be stated to them in writing. *Denver Consol. Elec. Co.* v. *Simpson* (Colo.) 566

USAGE. See CUSTOM.

USURY.

The defense of usury cannot be set up by an assignee for certain creditors among whom is not included the one claiming the usurious debt, where the assignee has no property chargeable with the payment of that debt in common with others, and the assets coming to him will not be affected by the fact that such usury does or does not exist. *Parker* v. *Bethel Hotel Co.* (Tenn.) 706

NOTES AND BRIEFS.

Usury; to bar remedy in equity. 706

VETERINARY SURGEON. See DISCOVERY.

VOTERS AND ELECTIONS.

1. The official announcement of the result of an election by the proper canvassing board is of binding force as to the fact of an actual election, until reversed or set aside by a court of competent jurisdiction. *State, Lamar,* v. *Johnson* (Fla.) 357

2. A statute making it an indictable offense to vote without presenting to the judges of election an original poll-tax receipt, or a certified duplicate copy thereof, or a certificate of a constable or deputy collector or else an affidavit of the voter that he has paid his poll tax and that his receipt is lost or misplaced, is within the power of the legislature, even as applied to a voter who has actually paid his poll tax, where the Constitution requires "satisfactory evidence" of such payment, and also gives the legislature power to enact laws "to secure the freedom of elections and the purity of the ballot box." *State* v. *Old* (Tenn.) 837

WAGES. See EXECUTORS AND ADMINISTRATORS.

WATERS. See also CONSTITUTIONAL LAW, 23; CONTRACTS, 15; INJUNCTION, 3, 4.

1. An island formed in a navigable river where land has been washed away years before does not belong to the owner of the remainder of the tract, unless the formation of the island is made by accretions beginning at the water line of his remaining land. *Wallace* v. *Driver* (Ark.) 317

2. Deepening the natural line of drainage at the outlet of a pond or marsh fed entirely by surface water, without doing anything more than is necessary in the interests of good husbandry, does not constitute a cause of action in favor of the owner of lower lands on which the water will be more liable to overflow or will overflow in greater quantities in case of unusually heavy rains, where it does not appear that he cannot protect himself at small expense compared with the benefits resulting to the upper proprietor from the improved drainage of his lands. *Gilfillan* v. *Schmidt* (Minn.) 547

3. Water need not be furnished without pay by an incorporated board of water commissioners having no source of revenue for the running expenses of the waterworks except the water rates, to a house of correction which is under the control, for the most part, of a board of inspectors, and not of the city council, although the city is obliged to pay the expenses so far as they exceed the earnings of the institution, since any such burden should be laid upon the whole body of taxpayers of the city, and not upon those only who are private consumers of water. *Detroit* v. *Board of Water Comrs.* (Mich.) 463

NOTES AND BRIEFS.

Waters; right to land made by accretion. 317

Rights as to surface waters. 547

WILLS. See also DESCENT AND DISTRIBUTION, 4.

1. Children cannot be deprived of their rights in property given them by will, by the fact that a contract by the testator to give property to their father, which was not carried out, is enforced against the estate. *Nowack* v. *Berger* (Mo.) 810

2. An entry of an account in a savings bank, in the names of husband and wife, subject to the order of either and to survivorship on the death of either, made by a transfer of funds from a former account in the name of the husband alone, but designating his wife as the person to whom payment should be made in the event of his absence or death, makes the new account entirely separate and distinct, so that the testamentary character of the old account will not inhere in the new one and make it admissible to probate. *Metropolitan Sav. Bank* v. *Murphy* (Md.) 454

3. Testator's intent that the heirs are to be ascertained by the statute in force when the executory devise take effect appears where a devise giving the fee to daughters provides that if they leave no surviving issue the estate "on their decease" shall be divided among his heirs at law according to the statute of descents, their heirs and assigns forever,—especially where there would be at his death but one heir recognized by law besides the daughters, because of the alienage of a son who was nevertheless recognized by the will as a beneficiary. *De Wolf* v. *Middleton* (R. I.) 146

4. Other devisees must contribute to make up a deficit in a devise caused by a widow's election to take dower instead of a gift under the will, where the refused share of the widow given to the disappointed devisee is not sufficient to supply the loss to such devisee. *Latta* v. *Brown* (Tenn.) 840

5. The right of remaindermen to be accelerated and immediately to enter upon and enjoy the use of land devised subject to a widow's life estate, which arises when she refuses to take under the will, is subject to the superior right of a disappointed devisee whose share is diminished by the widow's election to have compensation for such loss by taking the life interest which the widow refused. *Id.*

NOTES AND BRIEFS.

Wills; deficit caused by widow's election; accelerating remaindermen. 840

WITNESSES.

1. A judge cannot testify as a witness in a criminal trial over which he is presiding, under Sand. & H. (Ark.) Dig. § 2965, providing that the judge may be called as a witness by either party, but that in such case it is in the discretion of the court to order the trial to take place before another judge or jury. *Rogers* v. *State* (Ark.) 465

2. A party to a contract with a deceased person, as well as to a cause of action against his estate, is incompetent to testify in the case. *Nowack* v. *Berger* (Mo.) 810

3. The credibility of a witness cannot be impeached by showing that she was addicted to the morphine habit, unless it is shown that she was under the influence of the drug when the incident occurred of which she has testified at the trial, or unless her memory is impaired. *State* v. *Gleim* (Mont.) 294

4. A defendant in a criminal case cannot be questioned as to matters wholly remote from the question of guilt or innocence of the crime charged, so as to amount to a general assault upon his character. *Id.*

NOTES AND BRIEFS.

Witnesses; competency of judge as witness in a cause on trial before him:—(I.) Rule as to judges; (II.) justices of peace. 465

WORLD'S FAIR. See COUNTIES.

WRIT AND PROCESS.

Service of process on the persons who were last elected president and secretary of a corporation which has been defunct for several years, and one of whom has claimed to be the sole stockholder and owner of the assets, where they appear and answer in a suit to wind up its affairs, must be regarded as having been made on them officially as well as individually. *Parker* v. *Bethel Hotel Co.* (Tenn.) 706